State Equipment, Inc. *and* United Mine Workers of America. Cases 9–CA–32099, 9–CA–32277, 9–CA–32392–1, –2, 9–CA–33325, and 9–RC–16457

November 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 28, 1996, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified[3] and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, State Equipment, Inc., Cross Lanes, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their knowledge of union organizing activities and sympathies.

(b) Threatening employees with reduced advancement opportunity because of their support for United Mine Workers of America or any other labor organization.

(c) Threatening employees with loss of jobs if they select the Union as their collective-bargaining representative.

(d) Telling employees that it cannot give raises if they select the Union as their collective-bargaining representative.

(e) Asking employees to ascertain and disclose to the Respondent the union membership, activities, and sympathies of other employees.

(f) Discharging or laying off employees or issuing written warnings to employees, because they engage in union activities or other protected concerted activities or because they gave testimony under the Act.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock, and to the unlawful written warnings issued to Joseph T. Cottrell and Carl Brock, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the written warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cross Lanes, West Virginia, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that employee Landes was eligible to vote in the election, we note that the Respondent has not shown that Landes' prospect of transferring out of the unit was sufficiently finite as of the payroll eligibility date to render him ineligible to vote. See *Ameritech Communications*, 297 NLRB 654, 655–656 (1990); cf. *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992).

[2] Although the judge cited *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in his analysis of the discharge of employee Chapman, he failed to cite it in his analysis of the other alleged violations of Sec. 8(a)(3) and (4) of the Act. It is clear, however, that the judge's findings and conclusions regarding those allegations fully satisify the analytical objectives of *Wright Line*. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 9–RC–16457 is remanded to the Regional Director for Region 9; that the challenges to the ballots of Harold Kirk and Johnny Bailey are sustained and their ballots are void; and that the challenges to the ballots of David W. Westfall, Raymond Smith, Ty E. Landes, Virgil Elliott, and John Cremeans are overruled, and the Regional Director is directed to open and count the ballots of Westfall, Smith, Landes, Elliott, and Cremeans and to prepare and serve on the parties a revised tally of ballots.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their knowledge of union organizing activities and sympathies.

WE WILL NOT threaten our employees with reduced advancement opportunity because of their support for United Mine Workers of America or any other labor organization.

WE WILL NOT threaten our employees with the loss of their jobs if they select the Union as their collective-bargaining representative.

WE WILL NOT tell our employees that we cannot give raises if they select the Union as their collective-bargaining representative.

WE WILL NOT ask our employees to find out and tell us about who is in the Union and about their union activities and sympathies.

WE WILL NOT discharge or layoff employees or issue written warnings to our employees, because they engage in union activities or other protected concerted activities or because they give testimony under the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock, and to the unlawful written warnings issued to Joseph T. Cottrell and Carl Brock, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and Cottrell's and Brock's written warnings will not be used against them in any way.

STATE EQUIPMENT, INC.

Andrew Lang, Esq., for the General Counsel.
Fred F. Holroyd, Esq. (Holroyd and Yost), of Charleston, West Virginia, for the Respondent.
Mark March Jr., of Diamond, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. The charge in Case 9–CA–32099 was filed by United Mine Workers of America (the Union or the Petitioner) on August 18, 1994. The complaint issued on October 5, 1994, alleging that State Equipment, Inc. (the Respondent, the Company, or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminatorily dis-

charging employee David Westfall and violated Section 8(a)(1) of the Act by interrogating employees about their knowledge of union organizing activities.

The petition in Case 9–RC–16457 was filed on September 19, 1994, by the Petitioner. Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 9 on October 7, 1994, a secret-ballot election was conducted on November 4, 1994. The tally of ballots showed eight votes cast for the Petitioner, seven votes cast against the Petitioner, and seven challenged ballots. No objections to conduct affecting the results of the election were filed.

Charges in Cases 9–CA–32277, 9–CA–32392, and 9–CA–32392–2, were filed on October 17, November 28, and December 12, 1994, respectively by the Union. An order consolidating cases,[1] consolidated complaint and notice of hearing issued on December 27, 1994, alleging that Respondent committed additional violations over and above those alleged in the original complaint. The consolidated complaint alleged that Respondent also violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employees Ty E. Landes and Everett Raymond Smith and also violated Section 8(a)(1) by interrogating employees about their union sympathies and activities, threatening an employee that Respondent could not give raises if the employees selected the Union as their collective-bargaining representative, asking an employee to ascertain and disclose to Respondent the union membership, activities, and sympathies of other employees and threatening an employee with the loss of his job if the employees selected the Union as their collective-bargaining representative.

A Report on Challenged Ballots, Order Directing Hearing, Order, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing issued on January 6, 1995. In this document, the Acting Regional Director found that the challenged ballots are sufficient in number to affect the results of the election and concluded that the eligibility issues should be heard and considered by an administrative law judge along with the alleged unfair labor practices. Consequently, the Acting Regional Director ordered that a hearing be held to resolve the issues raised by the challenged ballots, that Case 9–RC–16457 be consolidated with Cases 9–CA–32099 and 9–CA–32277, that the designated administrative law judge resolve the challenged ballot issues and that thereafter the cases be transferred to, and continued before, the Board.

An order consolidating cases,[2] second consolidated complaint and notice of hearing issued on January 18, 1995. The second consolidated complaint added allegations that Respondent violated Section 8(a)(1), (3), and (4) by issuing a written warning to and subsequently laying off employee Carl Brock because he engaged in union activities and because he gave testimony to the Board in the form of an affidavit in Case 9–CA–32099 and violated Section 8(a)(1) and (3) by discharging employee Jeffrey Chapman because he engaged in union activities. Respondent filed timely answers to all complaints denying the commission of any unfair labor practices.

At the hearing, the General Counsel amended the second consolidated complaint by alleging that Respondent violated Section 8(a)(1) by threatening an employee with reduced advancement opportunity because of his support for the Union. This allegation was also denied by Respondent.

These consolidated cases were tried before me on April 4 and 5 and May 9, 1995, in Charleston, West Virginia, and the hearing was closed on May 9, 1995.

On October 13, 1995, the Union filed the charge in Case 9–CA–33325. complaint issued on November 29, 1995, alleging that Respondent violated Section 8(a)(1) and (3) by reprimanding, then discharging employee, Joseph T. Cottrell because he had engaged in union activities. On the same date the General Counsel moved to consolidate Case 9–CA–33325 with Cases 9–CA–32099, et al. and moved further that the consolidated cases be reopened for hearing. The motion was granted and on March 21 and 22, 1996, the newly consolidated cases were tried before me on Charleston, West Virginia.

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent is engaged in the wholesale and retail sale and rental of construction equipment at various sites including Ashland, Kentucky; and Cross Lanes, Parkersburg, Bridgeport, and Beckley, West Virginia. Its management personnel include Terry W. Lamm, president; Ray Mannon, coowner and vice president; Cecil Sheppard, service manager; Johnny Bailey, first-shop foreman; later service manager, replacing Sheppard; and Tim Fallecker, parts manager.

A. *The Discharge of Wayne Westfall*

Prior to accepting employment with Respondent on or about September 15, 1992, Wayne Westfall had worked for 20 years as a maintenance mechanics, most recently at shops where the employees were represented by the United Mine Workers of America. Westfall was hired by Respondent as an equipment mechanic to work on excavators, bulldozers, backhoes, and loaders, equipment used by general contractors in the construction industry and in the coat industry.

When Westfall applied for work with Respondent he noted his experience on his application including the fact that two of his previous employers were unionized. During his interview, he freely admitted that when he had been employed at the Consolidated Coal Company, he was president of the local union for 6 years and served on various committees on

[1] Consolidating Cases 9–CA–32099 and 9–CA–32277.

[2] Consolidating Cases 9–CA–32099 and 9–CA–32277 with Cases 9–CA–32392, 9–CA–32392–2, and 9–RC–16457.

behalf of the union. He added, however, that he could work union or nonunion, that it did not make any difference. Thus, Respondent was aware from the very beginning that Westfall had union connections but hired him nevertheless.

During the initial employment interview, both Sheppard and Mannon spoke with Westfall individually. He told each of them that he was looking for a permanent job, something that he could stay with because in the past he had been laid off several times from different jobs. He was told that Respondent, to that time, had never had a layoff but during slow periods would cut down to 3- or 4-day weeks. Employee Jeffrey Chapman confirmed that during slow periods the Company would cut the hours of shop employees down to 32 hours per week and that this actually occurred while he was employed by Respondent.

Westfall worked for Respondent from September 1992 until February 1994[3] with the record indicating no particular signs of dissatisfaction with him as an employee. In February, Respondent sent Westfall to the 90 Series Excavator School for a 1-week course in Racine, Wisconsin. The purpose of the schooling was apparently to train him in the operation, repair, and maintenance of one specific type of equipment. The fact that they would send Westfall to school clearly reflects Respondent's confidence in his ability and an intention to continue to employ him. Respondent also had in-house courses for its mechanics which all attended. Westfall, however, not only attended these courses, but also attended at least one special course to which only he and the shop boss, Johnny Bailey, was invited. The course involved a new computer testing tool.

When Westfall was sent to school in Racine, he was given $500 expense money. Nothing was said to him at the time concerning keeping receipts but he did so anyway. When he returned to work after completing his stay in Racine, Marie Eiler, office manager, asked him for the receipts. Since the receipts were at his residence in Quick, West Virginia, 30 miles away from Bell, where he was staying at the time, and the weather was bad, he simply told Eiler that he had not been told to keep receipts, apparently hoping that the matter would be dropped.

A few days later, however, Eiler again asked for the receipts and Westfall promised to get them for her. That day, or a day or two later, Sheppard also brought the matter to Westfall's attention. About a week later he brought them in and gave them to Eiler.

Respondent takes the position that this incident is one of a number which occurred during the several months prior to Westfall's termination which reflect a pattern of behavior on his part which gave rise to Respondent's general dissatisfaction with his work performance. To support Sheppard's testimony that this general dissatisfaction existed, Respondent offered a series of five dated notes, each reflecting the facts surrounding a particular incident and supporting his testimony that these incidents were of serious concern to him. With regard to these notes (R. Exhs. 7a–e), Sheppard testified that they are notes which had been kept on Wayne Westfall and written in Sheppard's own hand. When examined as to how many of the notes were written after Westfall's discharge, Sheppard at first denied that any of them were written after his discharge. Subsequently, however, in later confused testimony, he appears to be admitting that some of the notes were made at a later date than the date appearing thereon, perhaps after Westfall's termination.

The notes were received into the record, over the General Counsel's objection, not as documents prepared in the regular course of business and to be relied on as such, but as documents to be analyzed in light of the testimony of the witnesses to help determine credibility with regard to the seriousness with which Respondent considered the incidents described.

With regard to the note dated February 18, 1994, dealing with Westfall's initial failure to provide receipts, Sheppard was not clear as to when he prepared this document, whether it was prepared on the date appearing thereon, as part of the personnel records, thus indicating concern about Westfall's behavior and job performance, or prepared subsequent to Westfall's discharge, to build a case against him in preparation for trial.

Since the question of when the document was prepared was an issue discussed during the hearing and since clarification was of obvious importance, why were greater efforts not made to solve this problem? Marie Eiler's signature appears at the bottom of the note along with that of Sheppard. Why was she not called to testify concerning when she signed the document and under what circumstances. According to the substance of the note, Ray Mannon told Westfall the day he left for Racine that he had to keep receipts. Why was not Mannon called as a witness in support of Sheppard's testimony and his note.

The record contains a number of formal documents (employee warning reports) and informal documents (notes) describing incidents involving other employees of Respondent. In each and every case, the incident report was presented to the employee involved for him to affix his signature. In the case of Westfall and the receipts and the note (R. Exh. 7a) covering the incident, however, Westfall credibly testified that he was never told that the incident would be the subject of a written report to be placed in his personnel file. He stated that he first became aware that the Respondent had written something down about the receipts incident when he and the General Counsel were preparing for trial, several months later.

From the facts found immediately above, I conclude that the document offered by Respondent (R. Exh. 7a) is not a legitimate business or personnel record and cannot be relied on as evidence in support of Respondent's case.

In March, Sheppard offered Westfall a job at Respondent's Clarksburg facility, Westfall had been to Clarksburg on two or three previous occasions helping them out with their work. In March, an extra road service mechanic was needed there and Sheppard asked Westfall if he would be willing to take the job and move up there. He informed him that he would receive $1.50 per hour more. Westfall countered that he would go for $4 more per hour. The subject was dropped and never brought up again. The offer, however, clearly indicates Sheppard's satisfaction with Westfall's job performance and faith in his ability to perform the work of a road service mechanic.

The second note in the series offered by Respondent to reflect Westfall's poor job performance (R. Exh. 7b) is dated March 10, 1994, and describes an incident which is alleged to have occurred on that date. It is not certain from

[3] Hereinafter, all dates are in 1994 unless noted otherwise.

Sheppard's testimony if this document was written on or about March 10, 1994, and is part of the personnel records of the Company or was prepared solely for use at the trial. The document states:

> While transporting a set of logging forks, Wayne hooked up improperly causing the mounting bracket to be damaged. Although damages occasionally occur, Wayne was instructed by Shop Foreman Johnny Bailey to make repairs to the bracket, Wayne *did not* make the repairs and returned them to stock.

Sheppard prepared and signed this document. Bailey also signed it.

With regard to the alleged March 10 incident and the note which purports to memorialize it, Sheppard testified that Johnny Bailey is the shop foreman and lead mechanic who troubleshoots and oversees a lot of the work. According to Sheppard, he was not present when Bailey instructed Westfall to repair the logging forks before returning them to stock. He just heard about it through Bailey.

Bailey testified concerning a number of matters but was not examined concerning the March 10 incident, nor the note that Sheppard wrote concerning that incident, nor about how or when his signature was placed on that document.

Westfall could not recall damaging any logging forks although he could recall putting logging forks on two different pieces of equipment. He also testified that he could not recall Bailey ever telling him to repair something and put it back in stock, then failing to do so. Finally, he testified that he never refused to do anything that Bailey told him to do. The record does not indicate that Westfall was ever asked to sign the March 10 note or that he was ever shown a copy of it by Sheppard. I do not rely on this document to support Respondent's case.

In the spring of 1994, a discussion occurred which clearly reflected Sheppard's faith in Westfall and his abilities. One day Sheppard came to Westfall and told him that management was considering taking one employee and making him a field troubleshooter. The plan was for the Company to buy a van, fill it with gauges, computer boxes, and other equipment, and send the newly appointed field troubleshooter out to any problem as needed. Sheppard asked Westfall if he would take the job and although the same discussion took place on several occasions thereafter, the job never materialized. About this time, also, Westfall received a 50-cent-per-hour wage increase.

Management's faith in Westfall's expertise was shared by his fellow employees. Walker testified that whenever he was in need of advice or an explanation, he would seek out Westfall first, even before Bailey, the shop foreman, because he was aware that Westfall was knowledgeable about technical problems and was always willing to take the time to give an explanation.

Fellow employee, Carl Brock supported Walker's testimony concerning Westfall's ability. He stated that the two best mechanics in the shop were Bailey and Westfall and that whenever the other mechanics had a question, they would seek advice from Westfall. Brock also testified concerning a skid steer, Case 1835 or 40 being sent from Beckley to Cross Lanes specifically for Westfall to work on because the Beckley mechanic could not fix it and the customer was angry. Westfall fixed it and it was then returned to Beckley.

The third note of the series (R. Exh. 7c) is dated June 3, 1994, and, like the others, was offered into the record by Respondent to indicate the existence of a pattern of behavior in Westfall's work performance which disturbed Sheppard to such an extent that it eventually became one of the reasons for his discharge. The note states:

> Wayne Westfall was questioned about a broken mounting bolt which held the loader frame in place. He removed the machine from the shop area knowing the bolt was broken and when questioned, he gave Johnny Bailey and myself a false statement, denying he knew the problem existed. I was witness to the fact the bolt was broken by Wayne.

This note was signed by both Sheppard and Bailey.

Sheppard testified more about the note of June 3, 1994, than about the incident which it purportedly describes. According to Sheppard, he brought Westfall into his office to discuss the problem involving the tractor and he composed the note at the time of the occurrence as he did with all the notes submitted. He once again testified that these notes were all composed and kept in the employee's, Westfall's, file in the regular course of business. This particular note, the June 3 note, was the only one of the five in the series, however, that Sheppard considered a warning, a verbal warning. The other four he described as "just notes kept." The note was not signed by Westfall, and Sheppard admitted that he did not ask Westfall to sign it. He did, however, testify that he and Westfall talked about the note but that he did not give him a copy of it. Sheppard did not testify concerning the incident itself nor about the facts which gave rise to the writing of the note.

Bailey's testimony on the subject of the June 3 incident was limited to a statement that Westfall's putting the machine out of the shop with a broken bolt in the loader frame was an example of his poor job performance. Although Bailey made reference to the existence of the note on the subject as of the day of the hearing, he did not offer any testimony as to the circumstances surrounding his placing his signature on the document or indicate when he had signed it. He said nothing about Westfall's alleged false statement which is referred to in the note.

Westfall testified that he could recall breaking the bolt on a tractor while doing some work on it. He admitted that he had forgotten to replace the bolt before the tractor went out of the shop. He testified that Sheppard later bought the matter to his attention. He told Sheppard that he would go out and get the tractor and repair it, then did so. He stated that he never denied to Sheppard that it was his fault because he knew he had broken the bolt and readily admitted that fact to him. According to Westfall, it took him between 15 and 30 minutes to drill the old bolt out, retap the threads and put a new bolt in. After Sheppard first drew Westfall's attention to the broken bolt, he fixed it immediately and there were no further conversations about it with Sheppard or any other supervisors or members of management.

With regard to the document dated June 3 (R. Exh. 7c), Westfall testified that he was unaware of the existence of any written record of the incident until just before trial when

counsel for the General Counsel first discussed the June 3 document with him. By this testimony, Westfall, in effect, contradicted Sheppard's testimony that he discussed the note with Westfall at the time the incident occurred. I credit Westfall with regard to this testimonial contradiction.

On July 14, a tractor-trailer load of smaller trailers was delivered to Respondent's facility. They were stacked on the larger trailer and Westfall and Kenny Napier were asked to off-load the smaller trailers. In response to the order, Westfall went to get the piece of equipment necessary for the job. In the process of moving that piece of equipment, he ran over the corner of a trailer belonging to Mountain Air Gas, a good and regular customer of Respondent who had parked it there in Respondent's lot. Westfall did not notice that he had damaged the trailer until Terry Jordan, a fellow employee apprised him of the accident. Westfall got out of the equipment he was using, noted the damage and, since there was nothing he could do about it, he continued with his job. Later, Johnny Bailey came out and noted the damage. Westfall advised him that it had been an accident, that he had not meant to hit the trailer. Westfall later testified that he had checked for clearance but had simply misjudged the distance while backing up. Shortly thereafter, Sheppard came out of the office, looked at the damage to the customer's trailer, then went back in. Half an hour later Westfall was called into the office.

Once in the office, Westfall was advised by Sheppard, in Bailey's presence, that he was being given 5 days' suspension for running over the trailer. Sheppard explained that he knew it was an accident and that Westfall did not intend to do it but he had to give him the suspension because there was carelessness involved. Westfall agreed to take the suspension but argued that Respondent had never given anybody else time off for similar accidents.

After this brief discussion, Westfall was shown an employee warning report. Sheppard had written the company statement portion thereof describing the accident and the reason for the imposition of discipline. He offered the document to Westfall to fill out the portion entitled "Employee Statement" but Westfall refused to write any statement or to sign the document. Sheppard and Bailey both signed the document and Westfall left. At some point later on, Westfall came back and asked for a copy of the document. Sheppard told him that if he would sign the document, Sheppard would get him a copy. Westfall agreed. He was scheduled to return to work at 7:30 a.m., July 21.

Although Westfall had participated in general conversations about unions with other employees on occasion prior to his suspension, there is no evidence that Respondent decided to suspend him because he had engaged in these or any other union activities. There is no such allegation contained in the complaint and it is concluded that the suspension of Westfall on July 14 was for cause.

The suspension of Westfall upset him because he felt that he was being unfairly treated. He testified that similar accidents had occurred previously involving other employees and they had not been suspended on those occasions. Carl Brock testified that he and other employees had also been irritated by the suspension of Westfall and for the same reasons. He stated that Westfall's suspension served as one of several reasons for pursuing union representation.

On July 19, while on suspension, Westfall contacted the Union and spoke with Mark March, International representative, and asked him about organizing Respondent. Either later that day or the following day, he went to the union hall where he and March discussed organizational procedure. He also picked up union literature and authorization cards. Arrangements were made for a meeting with interested employees at Lowe's parking lot on July 21, the date that Westfall was scheduled to return to work.

On July 21, Westfall returned to work. That day he talked to employees Carl Brock and Joe Cottrell about the Union. He told Brock and Cottrell that he had contacted the Union and he was trying to schedule a meeting. He asked Brock to spread the word. That day, Brock talked to four or five other employees and told them that Westfall had been in contact with the Union and was trying to set up a meeting.

A little after 4 p.m., on July 21, about quitting time, Brock was approached by Bailey and asked if he had heard anything about a union. Brock denied hearing anything in particular, just the usual chatter.

I find Bailey's questioning of Brock, on this occasion, violative of Section 8(a)(1) of the Act as well as evidence of company knowledge of union activity on the part of both Westfall and Brock and possibly Cottrell.

On July 21, after work, Westfall met with Mark March, a representative of the Union, signed an authorization card and returned it to March.

During the next several days, particularly Monday, Tuesday, and Wednesday, July 25–27, Westfall discussed the Union with just about everyone in the shop. He asked them what their feelings were toward signing a union card or joining the Union. He talked to one or two, but not all, of the employees in the parts department. Parts department employee James Eric Walker confirmed Westfall's testimony by stating that he first heard about union activity at Respondent's facility, the week that Westfall came back after his suspension, and that he heard about it directly from Westfall. Employee Jeffrey Chapman, in turn, testified that he found out about the union activity from Walker.

On July 22, Westfall was working on a winch lying on a table in the engine bay when it apparently slipped off the table and hit the concrete floor. Brock, who witnessed the incident, testified that the winch did not appear to be damaged.

Sheppard heard the crash when the winch hit the floor and came over to the engine bay to see what had happened. Bailey came over as well. He could see no external damage to the winch so instructed Bailey to have the covers removed to check for internal damage. He then left the area. Bailey then assigned the job of inspecting for internal damage to Westfall and left also.

Westfall testified that he was in the process of repairing the winch when it dropped off the table. Then later, after Sheppard and Bailey left the area, he continued working on it. He removed the covers in order to get into the internal gearing and clutch system, work which he had not gotten to prior to the point where the winch fell off the table. He then completed the job and reassembled the winch.

Later that day, the winch was mounted on a bulldozer and tested to determine if it was in condition to return to the customer. The testing, according to the credited testimony of both Westfall and Brock, was witnessed by both Sheppard and Bailey. All four were present as it was demonstrated that

the winch operated properly. The winch was then removed from the bulldozer, then loaded on a service truck for eventual delivery to the customer's jobsite. Specifically for the dropped winch incident, Westfall received no reprimand, warning, or discipline either orally or in written form, either on the day of the incident or at any time thereafter. A note describing the entire winch incident (R. Exh. 7d) and signed by both Sheppard and Bailey, and dated July 22, was placed in the record at the hearing. Westfall, however, credibly testified that he had never been shown this note, and saw it for the first time while preparing for trial with counsel for the General Counsel.

On Tuesday, July 26, Respondent shipped the winch back to the customer's jobsite in Pennsboro, West Virginia. On July 29, the customer contacted Respondent complaining that the winch would not pay in; it would not reel up. Since Sheppard was getting ready to go on vacation and would be gone the following week, he left word with Bailey to dispatch employee Tim Drake out of Bridgeport, to go to Pennsboro to check into the problem with the winch.

Bailey followed Sheppard's orders and dispatched Drake to Pennsboro on or shortly after July 29. Drake pulled the winch off of the customer's bulldozer and took it back to the Bridgeport facility to repair it. This apparently took several days because Respondent had to lend the customer one of its own dozers while repairs were being made.

Sheppard did not get a report on the winch until after he returned from vacation which would have been the second week in August.

Sheppard testified that it was decided on Monday, July 25, to dismiss Westfall but it was also decided on that day to permit him to finish out the week while "management put some documents together" and held some meetings. The reasons it was decided to dismiss Westfall, according to Sheppard, was the winch incident and Westfall's demeanor around the shop, particularly the fact that he had been visiting with other employees a lot. Further, Sheppard noted, he had not been satisfied with Westfall's demeanor and his approach to his work prior to his suspension and thought that the suspension might improve his attitude but this, he said, did not happen. When Westfall returned from his suspension, he seemed quieter, according to Sheppard, and did not appear to put any effort into his work. Finally, Sheppard testified that Westfall was taking too long to complete one particular job which he was assigned following his return from suspension. That job involved putting a set of rock guards on a piece of equipment. He explained that he knew at the time that Westfall was taking a little too much time and after the job had been completed he ran a comparison and found out that he had been correct. The job took Westfall 14 to 14-1/2 hours and should have taken only 6, according to Sheppard. The record reflects that this job was completed on Westfall's last day, July 29. Despite his proclamation of alleged dissatisfaction with Westfall's approach to his work, his demeanor, and attitude during his last week of employment, Sheppard neither issued him any warnings nor offered him any counseling during that period. Sheppard still denied knowledge of any union activity on Westfall's part as of the time it was decided to dismiss him.

Westfall testified concerning the rock guard job that he had been asked to put a set of rock guards on a dozer. Rock guards are designed to keep rocks out of the chain and drive units. To accomplish the job, he had to clean and retap all of the holes which were full of dirt, sand, mud and rock. After completing this part of the job, he asked for the rock guards to attach to the vehicle. For the first time, at this point, he was told that all that was desired was that the front and rear guards be put on, not the center guard. Thus, he had already tapped twice the number of holes actually needed. Time on the job was also increased due to the fact that five or six taps broke off in the holes and it proved very difficult and time consuming to extract them. According to Westfall, the whole job took him 9 or 10 hours. During this period, management personnel were constantly walking by. At no time did any of them comment to Westfall that he was taking too much time to accomplish the work he was performing, nor did any of them suggest a different method of getting the job done.

During the hearing, Respondent offered into the record the last in the series of five notes (R. Exh. 7e). This one was dated July 28, 1994, and referred to the job discussed immediately above and was signed by Sheppard:

> Wayne's job performance and his attitude toward his job have deteriorated—taking too much time for minor jobs RE WO# 8824.

Westfall credibly testified that he was unaware of the existence of this note or of any written document referring to his work performance or attitude until the hearing when counsel for the General Counsel showed it to him. Inasmuch as Sheppard testified that he had decided on Monday, July 25, to dismiss Westfall and decided at a meeting on Thursday, July 28, that the dismissal should take place on Friday, July 29, clearly the job that Westfall was still performing on the date of his discharge had nothing to do with the decision to terminate. When this inconsistency was pointed out to Sheppard at the hearing, this testimony followed:

> Q. Then that business about the rock guards on the last day Mr. Westfall worked wasn't involved in your decision?
>
> A. No, it was just more of a backup to what we thought was going on.

Thus, Sheppard admitted padding the evidence in preparation for trial.

According to Sheppard's testimony, Sheppard, Mannon, and Bailey made the initial decision to dismiss Westfall for the reasons he described, but it was up to Terry Lamm to make the final decision after they presented the case against Westfall to him. The final decision to dismiss Westfall was made at the meeting held on Thursday, July 28, and that termination, it was agreed, would take place on Friday, July 29.

Terry Lamm testified, concerning Westfall's discharge, that Sheppard and Bailey came to him and to Mannon and told them that Westfall's performance was not very good, that it had not been very good before his suspension, and had gone down hill since his return. They told him that Westfall's attitude had not improved and that they felt he should be dismissed. Lamm apparently asked for no particulars, but simply said that if this is the way they felt, they should go ahead and do it.

Lamm testified that he authorized the discharge of Westfall solely on what he was told by Sheppard and Bailey.

He admitted that he had not been told by Sheppard and Bailey that Westfall had been warned or counseled about his alleged deteriorating performance and attitude and to his knowledge Westfall had received none. Finally, Lamm denied that he was aware of Westfall's union activity prior to his discharge and testified that his union sympathy played no part in his decision to authorize his discharge.

July 29 was just another day at work to Westfall. He had already clocked out and was getting ready to go home when Bailey told him that Sheppard wanted to talk to him. Sheppard happened to come by at that point and invited both Westfall and Bailey into his office. Once inside, Sheppard announced to Westfall that he was going to have to let him go. When Westfall asked him why, Sheppard simply repeated his statement. Westfall then demanded a reason and Sheppard said work performance was the reason. Westfall argued that it had to be more than work performance, that Sheppard had always been proud of his, Westfall's, work and held it out to everybody else as an example. He reminded Sheppard that he had sent him to school and repeated that there had to be some reason besides work performance. Sheppard then stated, "That's the only reason I have to give you. If you won't say anything and go on, it will never show up on your record."

Bailey testified that prior to Westfall's exit interview on July 29, he and Sheppard had discussed Westfall's job performance. They discussed how Westfall had "slacked off," how he kept going down hill on a lot of different pieces of equipment. The shop tickets reflected this, according to Bailey, and both he and Sheppard agreed as to the evaluation of Westfall as well as to the conclusion that he should be discharged. No shop tickets or other documentation was offered to support Bailey's testimony.

Bailey also testified concerning Westfall's attitude which he characterized as "real bad." He said it did not change after the suspension and might have gotten worse. In explanation of what he meant by a "bad attitude," Bailey stated that Westfall did not care whether he fixed anything and had no concern what kind of job he did. He also said that Westfall was real slow. The record contains no evidence that Bailey ever discussed Westfall's alleged deteriorating work performance or bad attitude with him.

Other matters considered by Sheppard and Bailey when deciding on discharging Westfall, according to Bailey, included the winch incident and the destruction of the customer's trailer, for which Westfall had been suspended.

Finally, Bailey testified that as of the date of Westfall's exit interview, he was unaware of any efforts on his part to unionize Respondent's facility.

At the hearing, Westfall was examined as to his approach to his work and his attitude. He denied that there was any change in either. He testified that he just did his job. Carl Brock supported Westfall's testimony with his own, stating that he did not notice any change in Westfall's attitude or application to his work after his return from suspension. He appeared to be working just as hard after the suspension as before.

Westfall left Sheppard's office after his termination interview, and went around to Lamm's office where he had to wait about an hour until a meeting that was going on in there concluded. He then went in and asked Lamm, Mannon and Tim Fallecker to explain why he had been discharged. At first, according to Westfall, they acted like they did not know what he was talking about. He told them that Sheppard had just fired him. He was then advised, "Well, Cecil runs the shop. Whatever he says, that's the way it goes." Westfall left.

B. *Conclusions Concerning the Discharge of Westfall*

When Respondent hired Westfall, it was known that he had been an officer in the Union. Nevertheless he was hired in September 1992 and worked uneventfully at least until February 1994 when the incident involving the receipts occurred. Inasmuch as Respondent maintained a specific disciplinary system involving the issuance of employee warning reports in cases of serious infractions of rules, and none was issued to Westfall on this occasion, I conclude that the matter was considered of little importance at the time. For the same reason, I find that the March 10 incident involving the logging forks, if it happened at all, was inconsequential in the minds of management and unworthy of either disciplinary action or the issuance of an employee warning report. In fact, management was so satisfied with Westfall's work during this period and thereafter that the Respondent gave him a raise and seriously considered him for the not yet established road mechanic troubleshooter's job. The same is true with regard to the June 3 broken bolt incident. No employee warning report was issued, no disciplinary action was taken and Sheppard's testimony, notwithstanding, no note was written at the time of the incident. The note place in the record, I find, to be total fiction, created at a later time, for the sole purpose of building a case upon which Respondent could defend its termination of Westfall.

The incident of July 14 in which Westfall damaged the customer's trailer, was given an employee warning report and told to sign the report stands out in marked contrast to the earlier incidents described supra. This was an incident which Sheppard clearly considered serious. His treatment of Westfall on this occasion was similar to actions taken by management on earlier occasions against other employees where there was legitimate concern on management's part. On each of those occasions, as on this one, the involved employee was given the same form with a description of the incident noted thereon by management. The employee was then told to sign the document if he agreed or to note his own version of the incident and to sign that, if he did not agree. The document was then placed in the employee's personnel file. Depending on the seriousness of the incident, the employee sometimes was subjected to further discipline as was Westfall.

The treatment of Westfall on this occasion and of other employees on similarly serious occasions, when contrasted to the notes offered by Respondent to substantiate its reasons for terminating Westfall convinces me that these notes (R. Exhs. 7a–e) are no more than scraps of pretextual detritus belatedly swept together to create the appearance of a foundation for a defense. The mere fact that the Respondent would attempt to manufacture such a defense is convincing evidence that it had no legitimate, lawful reasons for discharging Westfall.

The tone and content of the July 14 conversation is also of some evidentiary value. Sheppard was apologetic in telling Westfall that he knew that his damaging the customer's trailer was an accident but that he nevertheless had to discipline

him because there was carelessness involved. Respondent was later to claim that the July 14 accident was one of several incidents which reflected a pattern of poor work performance and a bad attitude, some of the incidents having occurred prior to July 14. Yet Sheppard, in discussing with Westfall the necessity for disciplining him, did not mention the accident as being part of a pattern of poor work performance or the result of an attitude problem. Rather, he mentioned only the incident that occurred that day and the fact that the carelessness demonstrated by Westfall required a suspension. I find that there was no pattern of poor work performance or bad attitude on Westfall's part as of July 14 and Sheppard did not believe that there was or else he would have brought up the subject in his discussion with Westfall on that date.

The record clearly reflects that Westfall was involved in organizing and other union activity beginning on July 19 and continuing on through the following week. It reveals further that these activities continued and increased on Respondent's premises throughout that period and that management not only was aware of it but engaged in surveillance of Westfall's activities, in particular his activities among employees in the parts department.

When Westfall was invited into Sheppard's office and advised that he was going to be let go, the sudden and abrupt termination was not accompanied by any explanation other than "work performance." When Westfall reminded Sheppard that he had always been proud of Westfall's work, had held it out as an example and had even sent him to school, Sheppard replied pointedly, "That's the only reason I have to give you. If you won't say anything and go on, it will never show up on your record." This parting statement appears to be a veiled, if somewhat vague threat. It should be noted that none of the specific reasons for Westfall's termination offered by Respondent at the trial were given in explanation of the discharge to Westfall at the time of discharge even though he demanded an explanation. Nor were the various notes (R. Exhs. 7a–e) shown to him at that time. That is, I find, because they did not yet exist.

Based on the factual scenario described above, I find that Westfall was deeply involved in union activities, that Respondent quickly became aware of these activities and fired Westfall because of them, in violation of Section 8(a)(1) and (3) of the Act. I further find that Respondent's explanation as to why it terminated Westfall is pretextual, not credible, and insufficient to overcome the General Counsel's prima facie case.

Despite Westfall's discharge the union organizing campaign continued. On August 3, the first union meeting took place in Lowe's parking lot. March represented the Union and met with three or four of Respondent's employees, including James Eric Walker, Carl Brock, and Robert Hunt. Walker had heard about the meeting from Westfall. The group discussed election procedures and the importance of obtaining signatures on cards. Three of the four signed cards during this meeting, the other employee, Westfall, had already signed a card. Literature and additional cards were given to the employees for further distribution.

Also on August 3, the Union, through its regional director, Donald Barnett, advised Respondent's president, Terry Lamm, that it was in the process of organizing Respondent's employees. Notification was by certified mail and made reference to the Labor Board's rules and regulations.

Following the August 3 union meeting, several additional meetings with Respondent's employees were scheduled by March and by Westfall, three to five of them at Westfall's home and several more at the union hall in Kanawha City, West Virginia. These meetings occurred on various dates between August 3 and November 4. March distributed additional union cards which were signed by Respondent's employees in attendance.

Brock attended all of these meetings. At one of them, he obtained a UMWA bumper sticker and was the first of Respondent's employees to display one on his car. This was sometime prior to September 7.

Walker attended one of the union meetings at Westfall's residence and some or all the ones held at the union hall. At one of these meetings he obtained union cards for further distribution to other employees of Respondent. He gave one card to Chapman who apparently did not immediately sign and return it. Subsequently, he gave a second card to Chapman which he signed while both were at work at Respondent's facility.

Chapman's interest in the Union was based on his hope of eventually securing insurance coverage through membership. Chapman attended some of the last few union meetings, two at Westfall's residence, the rest at the union hall.

About August 8, a full week after Westfall's discharge, Sheppard returned from his vacation and was given a report from the Bridgeport mechanic that described the problem with the winch which Westfall had dropped. According to Sheppard, the winch had internal damages. A part had been dislodged and some hoses had been cut. This kind of damage, in the opinion of both Sheppard and the mechanic, could have been caused by a jolt. Sheppard testified that he concluded, at this point, that the internal damage to the winch had been caused when Westfall dropped it and that Westfall had failed to take off the covers of the winch to inspect and repair the damage as he had been directed to do. Inasmuch as Sheppard did not find out about the type and extent of the damage to the winch until a week after Westfall's termination, obviously that incident could not have had anything to do with Sheppard's decision to discharge him.

On August 18, the Union filed the charge in the instant proceeding alleging the unlawful discharge of Westfall on July 29 and interrogation of another employee on July 25. When Respondent was served with a copy of the charge on August 22 it was obvious from the content thereof that the interrogation alleged most probably referred to Bailey's questioning of Brock and that Brock was cooperating with the Board and the Union in the investigation of the case.

Clearly, it was after the receipt of the charge and because of the filing of the charge that Sheppard decided to manufacture Respondent's pretextual case against Westfall. Sheppard specifically admitted that the note referring to the winch[4] could have been written after Westfall was discharged and that there was the possibility that although it was dated July 22, 1994, it was actually written sometime after July 29, 1994. When asked why he was writing up such documents, backdating them, and putting them in Westfall's file at a time when he had already been terminated, Sheppard's reply

[4] R. Exh. 7d.

was, "They were just history." I reject Sheppard's testimony as incredible and find that the entire exhibit[5] was manufactured as documentation to support Respondent's pretextual case against Westfall. Respondent's attempt to mislead the Board in its investigation of the facts casts serious doubt as to the credibility of Respondent's case, not only with regard to the reasons for its discharge of Westfall, but in all other respects as well.

On September 19, the Union filed the petition in Case 9–RC–16457. A copy was faxed to Respondent's attorney the following day.

On September 20 or 21 another union meeting was held at which UMWA bumper stickers were distributed to employees who attended. Five or six of them displayed these union bumper stickers on their private vehicles which they parked in Respondent's lot at work. These included Brock, whose sticker had been displayed earlier than the others, Joe Cottrell whose sticker was placed on his, Cottrell's, truck by Brock and James Eric Walker.

Although Chapman was given a union bumper sticker, he did not immediately display it on his car but kept it in a draw at work which served as a locker. On one occasion, Tim Fallecker,[6] parts manager, and Chapman's supervisor, showed the bumper sticker to a customer, thus indicating company knowledge of Chapman's prounion sympathies.

On or about September 22, Walker was at the parts counter when Lamm walked by. Walker stopped him to ask about a new machine coming out. Lamm then changed the subject. He said to Walker that he could see from his union bumper sticker that he was supporting the Union and wanted to know why. He asked Walker what the Union could do for him that he could not do for himself, why he thought the Union was important and why he thought the Union should be brought into State Equipment. He mentioned that he knew that Walker's goal was to go into machine sales but did not see him going into sales if the Union was brought in. Lamm continued by telling Walker that by supporting the Union, he would no longer he thinking, speaking or listening for himself but he and the other employees would be thinking, speaking and listening as part of a group process. Walker replied that he thought that everyone should be graded on his own merits. Walker testified that when Lamm told him that he did not see him getting into sales if the Union got in, he took it to mean that if he was going to support the Union, he would have no place in a salaried position, or as a "company man."

Lamm testified that he did, in fact, about this time, tell Walker that he had noticed his bumper sticker and obviously supported the Union and then asked him to explain why. Lamm admitted telling Walker that he felt that the Union would not benefit him because it would suppress his individualism so that he would no longer be looked at as a person but as part of a group. He denied, however, that sales or Walker's getting into sales was discussed during this conversation.

Between the two versions of this conversation, I credit that of Walker and agree with the General Counsel that by telling Walker that he could not see him going into sales if the Union was brought in, Lamm, in effect, was threatening him with reduced advancement opportunity because of his support for the Union in violation of Section 8(a)(1) of the Act.

Following the discharge of Westfall, during the period when the union meetings were first being held, but more particularly after certain employees began displaying UMWA bumper stickers on their vehicles, members of management paid increased attention to Walker and the other employees engaged in union activities. Whenever prounion employees took their breaks or one of the prounion parts department employees went out to ask a question of one of the mechanics, a member of management, Sheppard or Bailey, would follow, apparently to see what was going on, a practice not followed prior to the advent of union activity.

But management did not limit itself to merely watching its prounion employees. Walker testified that on three separate occasions, for an hour and a half each, Fallecker questioned him about the Union and that Sheppard, one afternoon, took him aside to tell him that he had been in the Union at one time himself but had not been helped. On this occasion, Sheppard advised him to think about what he was doing before voting for the Union. These discussions are not the basis for any allegations but do reflect the serious concern of management with the organizational campaign, and point up the fact that other conversations containing statements violative Section 8(a)(1) of the Act, were part of a larger pattern indicating serious concern on the part of management, rather than isolated statements possibly invented by overzealous prounion employees.

C. *The Interrogation and Termination of Everett Raymond Smith*

Smith was hired by Respondent for the first time to work at its Cross Lanes facility in October 1993 performing general labor including the steam cleaning of equipment. Bailey was his supervisor and told him what to do. Sometimes he would direct Smith to go into the shop and assist the mechanics. Smith also worked for Mannon at the time and testified that Mannon was good to him and that they got along well together.

Smith worked for Respondent until May 1994, at which time he was discharged for excessive absenteeism due to a drinking problem. At the time of his discharge, both Sheppard and Mannon told him that he was a good worker but they could not employ someone who was absent a lot. Smith told them that he intended to seek help with his drinking problem which caused his frequent absences and they said that if he did that, maybe he could get his job back.

About the first of August, Mannon contacted Smith, at the request of one of Smith's uncles, and asked him to come in and talk with Sheppard if he wanted to come back to work for Respondent. When Smith talked to Sheppard, however, he was told that there were no openings at the time.

On September 26, Mannon again called Smith and asked him to come to Cross Lanes and once more talk to Sheppard about getting his job back because they had an opening. At 3 p.m. that day, Smith met with Sheppard. Sheppard told him that the employee who was doing Smith's old job, primarily steam cleaning equipment, was going to be going back to school and that that job would be open. After some further conversation, Sheppard called Mannon and both agreed to let Smith came back to work. It was decided that

[5] R. Exhs. 7a–e.

[6] Follicar and other variations of this name appear throughout the record.

Smith would start the following day and would report at 6 a.m. at Mannon's home with a change of clothes, to go to Bridgeport for an overnight job. The work in Bridgeport was temporary in the sense that Respondent had some work for Smith to perform until his old job opened up later, after the college student left for school.

At 6 a.m., September 27, Smith reported for work at Mannon's residence. Mannon invited Smith in for a glass of juice and to sit for a while before leaving for the job. The hospitality indicates that everything was going well at the time. Mannon, like Smith, had packed clothes for the overnight stay. They left in Mannon's car.

To travel from Mannon's home in Barbourville to Bridgeport, their destination, the route would take them east almost to Charleston, then northeast to Bridgeport. Smith testified that shortly after leaving Barbourville, Mannon asked Smith what he thought about a union. Smith replied that he liked unions and that his dad and a lot of his uncles worked for the Union. Mannon immediately dropped the subject. Shortly thereafter, Mannon decided, for whatever reason, to go to Cross Lanes (Charleston) that day, just a few miles ahead, instead of to Bridgeport which was still over a hundred miles away. They then proceeded to Cross Lanes where Smith worked that day, taking out trash and sweeping all of the floors.

Mannon denied that there was any discussion about unions between him and Smith on September 27, Smith's first day on the job. However, I credit Smith and find that he did ask Smith what he thought about unions. I do so because management, at this time, was fully aware of the union organizing campaign which was going on, it had just been a few days since employees had begun to display UMWA stickers on their personal vehicles and Respondent had already demonstrated, not only an interest in its employees' union activities but also antiunion animus by terminating Westfall. So, it is more likely than not that, since the Union had already filed a petition for an election, Mannon would want to find out immediately from the newly hired Smith what his union sympathies might be. I find Mannon's interrogation of Smith on September 27, violative of Section 8(a)(1) of the Act. I also find that through this interrogation, Mannon successfully gained knowledge that Smith was prounion in his sympathies.

On September 28, Smith rode with Mannon to Bridgeport. On the highway north of Charleston, Mannon asked Smith what he thought about the strike that was in progress at a plant in the Kanawha Valley near Charleston. Smith replied that he was raised in an area where there was a lot of union activity and he was sympathetic with the Union. This conversation would, of course, have the effect of reinforcing Mannon's understanding of the depth of Smith's prounion convictions.

When Mannon and Smith arrived in Bridgeport on Wednesday, September 28, they worked that day and the next. Mannon and Smith worked together, laying down cloth in preparation for the delivery and pouring of stone, and picking up trash getting ready for the opening of a new shop. The work did not go smoothly. The wind was very strong and was blowing the cloth which was a hundred feet in length. Smith was having a difficult time holding it down and Mannon was apparently angry and was swearing at him, telling him that he could not do anything right. Later, when Smith was supposed to put railroad ties down in front of the garage doors, Mannon again criticized him, asking him, "Can't you do nothing right?" Again he swore at Smith. After work on Thursday, September 29, Smith drove back from Bridgeport alone in a company truck.

On Friday, September 30, Smith worked at Cross Lanes as did Mannon. That day, Smith asked Sheppard if he could go ahead and order uniforms. Sheppard replied that he wanted to talk to Mannon first. But then Sheppard told Smith to just go ahead and order them. Since the "uniform guy" was there at the time, Smith did so. I find that by Sheppard telling Smith to go ahead and order uniforms, he still intended to keep Smith as a regular, full-time employee doing his old job.

Smith testified that Mannon was not real friendly that day. He characterized him as "smart," but gave no examples. At the end of the day, Brock talked to Smith and told him to follow him down the road to the Dairy Queen where they could talk. When Smith arrived at the restaurant, Brock explained to him the situation with the Union and what was going on around the shop. Until then, Smith had known nothing about the organizational campaign. Brock gave Smith a union card which he filled out right there. Smith noted that Brock had union stickers all over his car, some of which said, "Vote yes for the Union."

On Monday through Wednesday, October 3 through 5, Smith worked at Bridgeport with Mannon. His work there, he testified, did not go well at all: "Ray treated me like a dog up there . . . he cussed at me, told me I couldn't do anything right and he was just all over me." According to Smith, his treatment from Mannon was worse than it had been the week before in Bridgeport. In Cross Lanes, the previous Friday, he had not worked directly with Mannon and there was no occasion for friction. At the motel, in Bridgeport, Mannon got Smith a nonsmoking room despite the fact that he knew that Smith was a smoker. Driving to and returning from Bridgeport that week, Mannon and Smith did not talk to each other. This was a 2-hour drive each way.

Smith testified that his work at Bridgeport was good and that, in his opinion, he was being maltreated because he was prounion. This opinion may be well founded inasmuch as Mannon had long been familiar and well satisfied with Smith's work during this prior stint with Respondent; Mannon was personally responsible for recalling Smith through contacts with Smith's family; then after his recall, in the middle of an organizing campaign, he suddenly found out for the first time that Smith was prounion. Under the circumstances, it is more likely than not that Mannon would be upset with Smith and showing his displeasure by maltreating him, perhaps even with the purpose in mind, of forcing him to quit his job. At any rate, it seems certain that Mannon, to this point, had not yet informed Sheppard or Lamm of Smith's prounion sympathies. After all, he was personally responsible for bringing Smith back on board.

On October 3, Respondent entered into a Stipulated Election Agreement wherein it was provided that a unit of production and maintenance employees, employed at Cross Lanes with an eligibility date of September 30, would vote in a representation election to be held November 4. This agreement was subsequently signed by a representative of the Union on October 5 and was approved by the Regional Director on October 7. The effect of this document was, among

other things, to make Smith eligible to vote in the forthcoming election.

On Friday, October 7, Smith worked all day at Cross Lanes. At quitting time, about 4:30 p.m., Smith went to Mannon's office and asked him if he could talk with him. Mannon agreed and for the sake of privacy invited Smith outside. Once outside the front door, Smith confided that he had no money, food, or gasoline for the weekend and asked Mannon if he could lend him some money. Mannon reached into his pocked and handed Smith $50. As of this time, the Company owed Smith money, apparently because he had not yet received his first paycheck. Smith, during his earlier employment had, in any case, borrowed money before from Mannon so Mannon was not surprised at the request.

Though not surprising that Mannon would lend Smith, a permanent employee, $50 to hold him over until he received his first paycheck, it would be surprising for him to lend a temporary contract laborer money, knowing that he had already completed his work and was liable to be gone. I find Mannon's loan to Smith on October 7 evidence that he fully believed, at the time, that Smith was, as of this date, a full-time permanent employee of Respondent.

After accepting the loan, Smith moved the conversation in another direction. He told Mannon that there was something going on in the shop and he did not know what it was. He asked Mannon what was going on with the Union, claiming that he did not know anything about it.[7] He asked Mannon how it had gotten started. Mannon offered to answer Smith's questions and, for the purpose of additional privacy, suggested they continue their conversation across the parking lot.

Once there, Mannon told Smith that he was not supposed to be talking to him about the Union and if Smith mentioned their conversation to anyone, he would deny that it had occurred. He then told Smith that a union acted as a bargaining agent for a unit of employees and tried to bargain with an employer on behalf of the employees for increased wages and improved benefits. In return for its services, the union would collect dues and assess employees certain fees. He also told Smith that he, himself, had once been a union member when he worked for the gas company but had joined only because he had to belong to the union in order to work there. He explained that he had walked a picket line but personally felt that he never needed a union to represent him, that people who had good work ethics did not necessarily need a union to represent them but still had to pay big union dues. He completed this portion of his lecture with the statement that belonging to a union never did him any good.

Directing his attention to the organizing efforts of Respondent's own employees, Mannon stated that if they did go union, if management wanted to give somebody a buck an hour raise, it could not do that. He added that he also did not like somebody coming in and telling him how to spend his money. The complaint alleges that Respondent violated Section 8(a)(1) of the Act when Mannon informed Smith that it could not give raises if the employees selected the Union as their collective-bargaining representative. I agree and so find.

[7] As noted earlier, Smith had discussed the Union with Brock the previous Friday, September 30, in the Dairy Queen and had signed a card at the time.

Turning then to specific employees whom he believed to be in favor or not in favor of union representation, Mannon said that he did not think that Kenny Napier was for the Union but that Brock had union bumper stickers on his car. He then told Smith that Westfall was the one who had gotten everything stirred up and had gotten the Union going, reviewing, in the process, the whole recent Westfall employment history.[8]

During this conversation, Smith asked Mannon how Mannon thought he was working out. Despite the recent harassment of Smith at the Bridgeport location, Mannon replied, "Great" then added that he did not have any problem with the way Smith was working and did not see any reason why Smith could not continue to work for Respondent for as long as he wanted providing he did not have a drinking problem or anything.

The conversation ended with Mannon stating that he would appreciate it if Smith heard anything around the shop concerning who was for the Union and who was not, to let him know. Smith replied that if he did as Mannon requested, it would be just between the two of them. Mannon agreed. Mannon, at this point, clearly felt that he had won Smith over to the company side.

The complaint alleges that on October 7, Respondent, by Ray Mannon asked an employee to ascertain and disclose to him the union membership, activities, and sympathies of other employees and thereby violated Section 8(a)(1) of the Act. I agree.

On October 7, two other events occurred which must be considered in analyzing the timing of the discharges. First, a copy of the complaint[9] was served on Respondent. This probably had the effect of awakening Respondent to the fact that its problems were not going to go away. Second, and more importantly, the Stipulated Election Agreement was approved by the Region, thus indicating that despite the issuance of the complaint, the election scheduled for November 4 would take place as previously decided and that employees in the Cross Lanes production and maintenance unit employed as of September 30 would be voting for or against representation. From appearances, it would seem that Smith, as of that date, would be eligible to vote.

On Monday, October 10, Smith reported to Cross Lanes for work. Just about all day he steam cleaned equipment on the steam rack.[10] At 4:30, Sheppard came out and told Smith that he needed to see him in the office. The two proceeded to an office where Mannon was already waiting. Sheppard told Smith that things were slow and he did not need him anymore at that time. Smith asked both Sheppard and Mannon if it was because of his work that he was being terminated. Both denied that Smith's work was the reason. They assured him that they had no problems with his work and that it was just that business was slow. Mannon said he would go ahead and write Smith a check and give it to him right then. Smith asked Mannon to keep him in mind if business picked up and both Mannon and Sheppard agreed. As

[8] Mannon denied that this part of the conversation ever happened. I credit Smith that it occurred as it appears in the text.

[9] Case 9–CA–32099.

[10] Brock testified that Smith's last day of work was Monday, thus supporting Smith on the issue. Mannon denied that Smith worked on Monday because there was no work available. Respondent offered no documentation on the issue. Smith and Brock are credited.

of the date of the hearing, however, Smith had heard nothing from Respondent about being recalled.

Smith testified that as of October 10, things did not look slow to him at Cross Lanes and as of his last day of work at Bridgeport there was lots of work yet to be done because everything had to be moved from the old shop to the new one that they had just built. Mannon had also mentioned to Smith that inventory time was coming up. Smith had been involved in doing inventory previously and was told by Mannon that he would probably be involved in the one that was just coming up. Mannon testified that Smith was not kept on to do the inventory because the inventory was not undertaken until several weeks later and by that time, in November, work was slow and there were enough employees still working to do it.

With regard to possible available work at Bridgeport, Mannon testified that Respondent had been in business there since 1986 but was in the process of building a new building which Smith had been working on. He admitted that as of October 10, Respondent had not yet moved into the new building, but by November 1 and 2 had done so. After first testifying that Respondent had finished in Bridgeport, Mannon later conceded that as of October 10 there was still work to do in Bridgeport but Respondent's work load had dropped off and "we were able to use our own people," implying that Smith was not considered one of them. On the issue of available work, I do not credit Mannon.

With regard to the type of work performed by Smith after he returned to work for Respondent, he testified that he worked a total of 9 days, five at Bridgeport and four at Cross Lanes.[11] At Bridgeport he worked from 7 a.m. to 5 p.m. There, as noted, he worked with Mannon laying cloth in preparation for dumping and spreading the stone, putting down ties and cleaning up while construction on the new building continued. When working at Cross Lanes Smith, his first day, only did odd jobs such as taking out trash and sweeping floors. This was because he was scheduled to work that day in Bridgeport and he had no assigned tasks at the Cross Lanes facility. The college student who had been hired in May to replace Smith when he was discharged for absenteeism, was still on the steam rack on a regular basis, cleaning equipment, and was not due to leave for college for several days. By October 6, however, when Smith returned from Bridgeport to work at Cross Lanes, the college student had returned to school and Smith picked up where he left off in May, working on the steam rack. On Monday, October 10, according to Smith, he worked all day cleaning equipment on the steam rack. The record is not specific on the subject but it seems safe to assume that he did the same kind of work between October 6 and 10 as he had always done at the Cross Lanes location before his termination the previous May.

Carl Brock testified in support of Smith. He stated that Smith, whenever he was at the Cross Lanes location, worked primarily on the steam rack. They worked together frequently, Smith helping Brock steam clean his equipment or helping him put tracks on dozers.

Smith testified that while working for Respondent the second time, he punched a timecard and while at Cross Lanes, worked for Johnny Bailey. When he moved back to Cross Lanes from the Bridgeport location, Smith testified, no one other than he did steam cleaning as a regular job.

Smith testified further, that when he started to work for the second time, no one told him that he was contract labor, that he was temporary or that he would be paid $5 per hour. Rather, he assumed he was an employee again and did not find out that he was not going to receive his regular pay until he received his paycheck after his discharge which turned out to be a little over $300.

D. *Conclusions Concerning the Interrogation and Termination of Everett Raymond Smith*

Based on the facts outlined above and the ongoing analysis thereof, I conclude that the termination of Smith was in violation of Section 8(a)(1) and (3) of the Act. In so finding, I rely on the following specific facts:

When Mannon called Smith on September 26, he told him to come in and talk to Sheppard about getting his job back because they had an opening. He said nothing about contract labor or about temporary work. The same day, when Smith personally talked to Sheppard, Sheppard told him that the employee who was then doing Smith's old job, primarily steam cleaning equipment, was going to be going back to school and that that job would be open. He did not mention temporary employment or contract labor. He discussed only Smith's old job with him.

Inasmuch as the college student was still doing Smith's job, it was decided to use Smith in Bridgeport, working with Mannon, until the student left for school.

Mannon was personally responsible for the rehiring of Smith. He liked Smith and they got along well together. When he heard on September 27 and 28 from Smith that he was prounion, he was disappointed and worried about recommending him for the job. This was reflected in his verbal abuse of Smith on the Bridgeport job.

On Friday, September 30, Sheppard told Smith to go ahead and order uniforms, indicating his intention to keep Smith as a full-time regular permanent employee. Indeed, he would hardly have had him order the uniforms if he regarded him as a temporary contract laborer.

On the afternoon of September 30, Brock engaged Smith in a discussion about the Union and Smith signed a union card. There is no evidence, however, that this activity came to the attention of management.

When Smith returned to work in Bridgeport on October 3 through 5, Mannon continued orally to abuse Smith, and neither would talk to each other on the long trips to and from Bridgeport. Clearly, Mannon was upset with Smith for some reason and, since Mannon did not address this issue at the hearing, I tend to believe it was for reasons explained earlier in this decision, i.e., Smith's prounion sympathies.

On October 7, when Mannon lent Smith $50, I find he did so because Smith was regarded as a full-time regular, permanent employee of Respondent and probably would not have given him the loan if he were a temporary contract laborer whose work had just run out.

On October 7, during Mannon's conversation with Smith about the Union, I find that his 8(a)(1) statements are further evidence of Respondent's antiunion animus and his blaming of Westfall for "getting the Union going" additional evidence of company knowledge of Westfall's involvement and

[11] Actually Smith may have worked 10 days, five at each location between September 27 and October 10 inclusive.

of my earlier finding of a violation with respect to his discharge.

When, during the same conversation, Mannon told Smith that his work was "great" and that he did not see any reason Smith could not continue to work for Respondent for as long as he wanted, it indicated even further that Mannon considered Smith a regular full-time employee, and a good one at that. Mannon did not deny making the statements attributed to him by Smith during this conversation.

Finally, the complaint alleges that Respondent violated Section 8(a)(1) of the Act when Mannon, at the end of the October 7 conversation, told Smith that he would appreciate it if Smith heard anything around the shop concerning who was for the Union and who was not, to let him know. I agree and so find.

By attempting to enlist Smith as an ally in helping Respondent find out the union sympathies of fellow employees, Mannon proved to be, not only an agent of Respondent for the commission of a violation of Section 8(a)(1) but an evidentiary indicator that Respondent was in the process of counting votes in order to determine its strategy, lawful or unlawful, prior to the November 4 election. The Stipulated Election Agreement had, in fact, been approved that very day.

Sometime after October 7, when Mannon assured Smith of his future as a regular, full-time permanent employee of Respondent and the Regional Director approved the Stipulated Election Agreement, but before October 10 when Sheppard advised Smith that things were slow and Respondent did not need him anymore, most likely there was a discussion among members of management during which probable employee votes were counted. Mannon, during this discussion must have advised the other members of management of Smith's prounion sympathies. On October 10, Respondent acted on this knowledge by terminating Smith.

By terminating Smith because of his union sympathies and because of his probable vote for the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

E. *The Interrogation of, Threats to, and Discharge of Ty E. Landes*

Ty Landes was a construction equipment mechanic with between 11 and 12 years of on-the-road and shop experience prior to coming to work for Respondent. Sometime prior to his hire by Respondent, he was employed, by an equipment rental company in California working on backhoes, dozers, loaders, rollers, and similar equipment but was making plans to move to Kentucky.

On a visit to the Kentucky-West Virginia area, in preparation for his move, Landes dropped off resumes at various potential employers. One of these was Respondent's Cross Lanes location where Sheppard interviewed him for 15–30 minutes for a job at Respondent's shop in, Ashland, Kentucky. After Landes returned to California, Sheppard called him and interviewed him a second time for the same job. At the end of the second interview, Sheppard advised Landes that he would like to hire him and in a few days, Landes accepted Sheppard's offer. The arrangement provided that Landes would eventually replace a retiring employee in a couple of months at Respondent's Ashland facility where Landes would be employed as a road mechanic. In the meantime, he was to work for the first 2 or 3 months out of the Cross Lanes location, initially through a probationary period to determine whether the Company would find his work acceptable. From these facts it is clear that Respondent was impressed with Landes' credentials and serious about making him a permanent employee.

Landes began working at Cross Lanes on September 6 as a heavy equipment mechanic under the supervision of Johnny Bailey. Bailey gave Landes his initial instructions including where he should punch in and out every day. During this period, Landes continued to live in Ashland and commute to Cross Lanes.

Initially, for the first 2 weeks, Landes heard nothing about the Union. Then, Kenny Napier and Carl Brock both asked Landes if he would like to come to a union meeting one evening after work. The first week, Landes declined the invitation on grounds that he was a new employee and did not want to start waves. He testified that he could tell the first two weeks already, that there was tension in the shop because of the Union and he wanted to keep a low profile.

On October 6, exactly 30 days after Landes started working at Cross Lanes, Sheppard entered into conversation with him about his work performance. It was just after lunch and Landes was working by himself at the far end of the shop. Sheppard approached him and asked him to come outside under the pretext of looking at something. Once outside Sheppard told Landes that he really just wanted to talk with him. He said that Landes was doing a good job and that once classes began, he was going to send him to some schools, apparently for additional training in areas where he thought that Landes was a little weak. He advised Landes that this discussion was Landes' 30-day review and he just wanted to tell him how well he was doing, that his job performance, neatness and attitude were real good. He noted how well Landes was getting along with everybody and told him that he was just informing him how well he was doing in order to keep him up-to-date. From this portion of the conversation, I conclude that Sheppard was pleased with Landes as an employee and as of October 6 intended to keep him as a regular permanent employee.

After evaluating Landes' work, Sheppard then steered the conversation to a new topic. He asked Landes if he had heard anything about the union organizing going on. The complaint alleges that this question is a violation of Section 8(a)(1) of the Act. I agree and so find.

Landes, in reply to Sheppard's question, said that he had heard bits and pieces from some of the employees and that was about it. Sheppard then advised Landes if he knew anything about the Union. Landes replied that he had never been in a union before and had no idea how they work. Sheppard then told Landes that he thought the Union would hurt the Company more than help it. He informed him that there would probably be a time when the employees would have to vote on whether or not they wanted a union and advised him that he should think his decision over real well "because it could determine [his] job in the long run." He told Landes that he should discuss it with his wife and family before making his decision about voting, "that it would determine [his] job." Sheppard explained that the Company would not be able to afford to pay everybody and since Landes was the latest person to be hired, he would be the first to go. Landes replied that when it came down to it, he "would go with the majority of the guys in the shop whatever direction they

wanted to go voting, since [he] was new, [he] didn't want . . . to start no waves, or anything.'' Sheppard then said that he did not want to know Landes' sentiments or how he would vote in the election. The conversation ended with Sheppard telling Landes ''to keep the good work up'' and Landes went back to work.[12]

The complaint alleges that during this conversation, Respondent, through Sheppard, threatened an employee, Landes, with the loss of his job if the employees selected the Union as their collective-bargaining representative. I agree and so find.

On October 6, Landes had commuted to work from Barbourville, Kentucky in Kenny Napier's car. Napier was going to the union meeting that evening and invited Landes to come along. Since Landes had no transportation otherwise, he felt that he had no choice and attended the meeting along with Napier. At the meeting, which was in Charleston at the union hall, Landes signed an authorization card in front of five or six other employees of the Company.

On October 7, Landes received his uniforms,[13] those which had been ordered 2 weeks before. Receipt of the uniforms together with his excellent evaluation of the day before made Landes believe that ''things were looking up.'' However, as noted, October 7 was the day that the Stipulated Election Agreement was approved by the Region, making Landes eligible to vote in it since he was clearly in the unit and employed as of September 30.

Landes testified that his next workday, Monday, October 10, was strange in that Sheppard and Bailey were noticeably short in their conversation with employees, Landes included. They carried stern expressions on their faces as though something was wrong. Otherwise, however, the day was normal and Landes had no particular problems that day, except that he felt that everybody [in management] was looking over his shoulder.

At the end of the workday, Sheppard came out and asked Landes to come into the conference room after he was done changing into street clothes. He did so and found Mannon also waiting for him. Sheppard announced that he was giving Landes his 30-day review[14] and that he was going to have to let Landes go. Landes pointed out that Sheppard had already given him his 30-day review the previous Thursday. Sheppard objected that the previous Thursday he had only been saying that he was going to give Landes a 30-day review, then said, ''Read the Paper'' and threw down a job evaluation or 30-day review for Landes to read. He repeated, ''Here's your review. This is our decision and this is what we're going to do. We have to let you go.'' At first, according to Landes, he did not want to argue with Sheppard because he was still trying to save his job. Then, when Sheppard gave him his review and his check, he knew that there was not a whole lot he could say because they had already made up their minds.

Landes testified that he was stunned. On Thursday, he was doing fine and on Monday he was fired. Nothing had occurred during the two workdays in between. Management offered no specifics as to what was wrong with his work. Sheppard only told him that he could not fulfill the job duties for which he had been hired and that they would have to find somebody else to fill the job.

Landes testified that he had never had any real problems with his work, he had never been written up in his entire life. While working for Respondent he had never had any of his work come back as defective. Considering this fact along with what he had been told the previous Thursday, he found the October 10 written review, ''Terrible'' and ''pretty shocking.''

At the hearing, Sheppard was called on to justify Landes' October 10 30-day review and his termination allegedly based on the review. He testified that field mechanics are required to be able to diagnose problems on their own, usually without a helper and are solely liable for the result, because there are no shop foreman or mechanics around to be of assistance. Sheppard testified that both he and Bailey concluded that Landes could not handle the job. Requested to give specific examples of proof that Landes was not capable of performing the field mechanics job, Sheppard could not recall any field jobs and was able to come up with just one shop job. That one involved a work order for Landes to prep a Case 580D machine for rent which he signed, thus indicating that the had performed all of the work necessary on the machine and had completed the job. According to Sheppard, he went back to see if Landes had actually performed the work and completed the job which he had signed for as finished. Although Landes had punched off on the work order, in reality he had not completed the job, according to Sheppard, and this was one of the factors on which he and Bailey relied in writing up Landes' October 10 evaluation and terminating him. He added that another factor was time related, that Landes expended too much time on small general tasks. Weighing these factors, Sheppard testified that neither he nor Bailey were comfortable putting Landes out there as a road mechanic.

Sheppard was specifically asked if he had ever told Landes, during his period of employment, that he was dissatisfied with his work. Sheppard admitted that he had never done so.

The General Counsel called two rebuttal witnesses to counter the testimony of Sheppard concerning Landes' October 10 evaluation and Respondent's alleged reasons for terminating him. Landes testified that he worked on the Case 580D machine on his last day of employment, October 10, in order to get it ready for rental. Up to that time, this particular machine had been parked out front of the shop, for sale. It was a quite different machine than any of the others that were being rented at the time in that it was a substantially older machine which the Company had given a quick paint job to and placed out front to sell. Compared to the other rental machines it was in poor shape, the lights were not working, and a lot of the safety and warning devices were not working either because they had been tapped off or

[12] Sheppard admitted that he did have a conversation with Landes on October 6, but his version of its content is quite different from that of Landes which appears in the text and is credited. Sheppard's version of the conversation is rejected.

[13] Sheppard testified that if an employee is on 30 days' probation, he will have him measured after the first 2 weeks, then order uniforms at that time or later. Since Landes received his uniforms on the 31st day, clearly Sheppard intended to keep him.

[14] Sheppard testified that this 30-day review was the result of Johnny Bailey's observation of Landes' work and Sheppard's and Bailey's evaluations. Their conclusion was that Landes could not handle a field service job.

bypassed. The machine also had leaky cylinders and parts that could possibly fall off.

When Landes was assigned this machine to work on, he was told to have it ready by the end of the day because it was scheduled to be rented out and they had no others available. At the time, there was only 2 hours or less until it was supposed to be picked up. To get as much done in the time allowed, Landes went over the whole machine as quickly as possible. He took care of the safety aspects first, the warning devices, back up alarms, the neutral start safety switch, and all the wiring that had been disconnected or cut. According to Landes, when he first began working on the wiring, "it looked like a rat had gotten underneath there and chewed it all up." The majority of the time put into the machine that day was in rewiring. When Landes was finished with the wiring, Bailey turned the machine on and discovered a growling noise in the transmission in low, low gear. That was the lowest gear that could be used to drive the machine. However, the growling only occurred in that one gear and the machine could be driven dispite the growling noise. It would be all right, according to Landes, to use the machine for certain purposes but not for others. It could be used for lighter work but not for heavier work. To use the machine as it was might eventually cause additional harm but to Landes, it sounded as though if there was any damage, it had been done already. Moreover, to completely repair the machine, to take out the transmission, analyze the problem, then put it back in, would take several days. Of course, there was no way this could be done and still send it out on rental that afternoon. It was just one half hour after Landes had completed working on this machine that he was discharged at the very end of the day. The record is silent as to whether or not the machine was rented out that day, silent as to whether Bailey was or was not dissatisfied with Landes' work on the machine, and silent as to whether or not Bailey complained to Sheppard about it prior to Landes' discharge. In any case, Sheppard did not mention Landes' work on the Case 580D machine, during the exit interview. The 30-day written review was not offered into evidence by any of the parties. However, it is doubtful that reference to Landes' work on the machine could have been included in it because of the time factor.

With respect to Sheppard's testimony that Landes took a long time to perform small tasks, Landes testified that no one in management had ever complained to him that he was taking too long to complete any small task. He never received a warning on the subject nor even a comment. In fact, Landes credibly testified that he never received any negative comments from management.

The other rebuttal witness called by the General Counsel was Carl Brock. He testified that he had had a conversation with Sheppard about Landes' work about the midpoint of Landes' employment. In this conversation Brock drew attention to a backhoe that Landes had been working on, how clean it was. Sheppard agreed with Brock and added that he wished that everyone, when he was servicing a machine, would take time to clean it up and make it look that good because a customer who might rent it, does not like to get into a dirty machine. Brock also corroborated Landes' testimony with regard to the Case 580D machine which he worked on the day of his discharge to the extent that he confirmed that it had been up for sale before it was assigned to Landes to prepare for rental and was in bad shape.

F. *Conclusions Concerning the Interrogation of, Threats to, and Discharge of Ty E. Landes*

Ty Landes was a very experienced construction equipment mechanic with excellent credentials who greatly impressed Sheppard. Sheppard hired Landes and was pleased with his work and told him so on October 6 during his 30-day evaluation conversation which clearly indicated an intent to keep him as a permanent full-time employee.

I find that Sheppard's interrogation of Landes, on October 6, during his 30-day review, was an attempt, first to determine how much Landes knew about the union activity then going on, then to find out precisely what his own union sympathies were. After his threat to Landes, that his job depended on his vote, failed to have its desired effect, and Landes admitted that he planned to vote with the majority of employees rather than as a company man, Sheppard had the information he needed for the eventual head count for the forthcoming election.

At that point in time, between October 7 and the evening of October 10, when Respondent's management made the decision to rid itself of known, but low profile union sympathizers such as Smith, it also determined to terminate Landes for the same reason, that is to eliminate a prounion vote.

The conclusion that Landes' discharge was motivated by considerations violative of the Act is supported not only by company knowledge of Landes' prounion sympathies and timing but by the transparently pretextual nature of the reasons for the discharge proffered. Thus, Sheppard testified that he and Bailey had concluded that Landes could not handle the job of road mechanic, but when asked for examples of proof that Landes was not capable of doing the job, Sheppard could come up with just one, the preparing of the Case 580D machine for rental. Since Landes credibly testified that he had completed that job just one half hour prior to his discharge, I find it impossible to believe that it could, by itself, serve as the basis for a 30-day review of Landes' employment record extending back to September 6. The written 30-day review given to Landes on October 10 was never offered into the record to show its content. If the Case 580D job was included in the October 10 30-day review, Sheppard would have had to go to the Case 580D machine himself or had Bailey do it for him. He would have had to inspect that machine, check it against Landes' signed report, determine the discrepancies, discuss the discrepancies with Bailey, type or write them into the 30-day review, and all in half an hour, to present to Landes at his discharge interview. This is basically what Sheppard claimed he did, but I do not believe it. Bailey was not called to testify concerning this matter and according to the credited testimony of Landes, Sheppard never mentioned the Case 580D job at all during his exit interview on October 10.

It would appear that Sheppard followed the same course, following his discriminatory discharge of Landes because of his union sympathies, as he had after Westfall's discharge. He went back in time to synthesize a pretextual scenario to disguise a discriminatorily motivated discharge to make it appear lawful.

As to Sheppard's testimony that the second reason that he and Bailey found Landes work unacceptable was that he took too long to perform small general tasks, I credit Landes' testimony that no one in management ever complained or commented to him that he was too slow. I also credit Brock's testimony that Sheppard was pleased with the fact that Landes took the extra time to do an exceptional job cleaning up the machines after working on them. I find that if the length of time that Landes took to perform tasks was a problem for Sheppard or Bailey, they would have told him so. Since they did not, there was no problem and the belated claim, after his discharge, that he was too slow, is a pretext offered to disguise the true reason for his discharge, namely, his decision to vote with the majority of employees rather than with the Company.

In short, I find that Respondent discharged its employee Ty E. Landes because of his prounion sympathies and to keep him from voting in the representation election in violation of Section 8(a)(1) and (3) of the Act.

On November 4, the representation election was conducted as scheduled. At the election a number of ballots were challenged. The challenged ballots will be discussed, infra.

G. *The Discharge of Jeffrey Chapman*

Chapman began working for Respondent on March 27, 1989, as a parts clerk at its Cross Lanes location. He and Eric Walker, the other regular parts clerk, both worked directly for Tim Fallecker during all relevant times here. Fallecker, himself, also worked the counter from time to time.

When Chapman was first hired, he worked 5 hours every Saturday for time and a half. However, when Walker was hired on October 1, 1993, and after he was trained to the point that he was capable of handling the duties at the parts counter to Fallecker's satisfaction, Fallecker allowed him to take on the Saturday position. At that time, according to Fallecker, he told Chapman and Walker that they were both responsible for working Saturdays. More specifically, he explained to them that he did not care who worked Saturdays, that it was his responsibility as supervisor, only to see that the position was covered with proper manpower. He told them that as long as they could agree on who would work on a particular Saturday, he would leave the matter up to them to decide, but if it ever came to a point of impasse, where neither one would work, he, Fallecker, would decide and would make the assignment.

There was no problem with the arrangement because Walker voluntarily assumed responsibility for Saturday work. He did so because he wanted the overtime whereas Chapman did not. It was successfully arranged between Chapman and Walker, along lines suggested by Fallecker, that if Walker needed a Saturday off, he could ask Chapman to work and if Chapman did not have anything planned, he would work. Between October 1, 1993, and November 11, 1994, when Walker left Respondent's employment, he asked Chapman to work for him only about three times and each time Chapman did so with no problem arising.

Chapman testified that he had explained to Fallecker at some point in the past that he would rather not work Saturdays and informed him of the reasons. He told Fallecker that he had medical cards for his three children, because he could not afford the Employer's insurance policy. These medical costs were provided by the welfare system and were based on Chapman's income. If his income increased beyond a certain amount, he would lose some or all his coverage. From time to time the welfare authorities would inquire about Chapman's earnings and he would have to provide check stubs to prove that his income had not increased beyond the maximum allowed. On several occasions, Chapman's income exceeded the limit and he was denied coverage for his oldest son. Chapman did not discuss his insurance problems with any other members of management but may have mentioned it to Walker or to another coworker.

An evaluation of Chapman's work covering the period July 1 through November 1, 1993, in Fallecker's handwriting was received into evidence. It clearly indicates that Fallecker was aware of Chapman's need for more affordable insurance. Fallecker admits that during the evaluation, Chapman told him that he needed better insurance coverage, but denies being told anything in detail. I credit Fallecker.

Another objection which Chapman had with working Saturdays involved travel, time, and distance. From his home to Cross Lanes it was 35 miles one way and took 45 minutes to travel. He testified that he noted this objection to working Saturdays to Fallecker also.

Finally, he also mentioned to Fallecker that on Saturdays he helped out a few old ladies, who belonged to his church, with their yard work. He sometimes was paid for the yard work, sometimes he was not but preferred doing this to working for Respondent on Saturday in any case.

Saturday work continued as a nonproblem from the time that Walker took over until November 1994. Then on Monday November 7, Walker asked Chapman to work for him the following Saturday, November 12. Chapman agreed to do so.

On Friday, November 11, Walker quit his job. There was a short conversation between Fallecker and Chapman to the effect that Chapman was expected to work that Saturday since Walker was gone. Chapman agreed and worked as he promised. With the quitting of Walker, the parts department consisted of Fallecker, Chapman, and Dewey Sheppard. Fallecker testified that the loss of Walker did not affect the overall arrangements for Saturday assignments. If the parts department employees could decide themselves who would work on any given Saturday, that would be the case, otherwise he would assign someone to work that Saturday.

By Friday, November 18, no one as yet had been chosen to work the next day. Fallecker had earlier gone to Sheppard and had gotten permission to ask Elswick if he wanted to work the parts counter on Saturday. He did not feel free just to go ahead and ask him because Sheppard was Elswick's supervisor.

The situation had changed since Walker had quit. Before, Fallecker could decide between Chapman and Walker which of them would have to work on any particular Saturday because both worked under his supervision and both were full-time parts counter clerks in the parts department. Now, he had no such choice. Elswick was not in the parts department and Fallecker had no authority over him. Elswick's job was handling parts for the shop employees in the service department. When mechanics needed parts, they would come to Elswick. He would get the part for them and charge it to the job for which the part was needed. Elswick only worked at the parts counter on a part-time basis.

To be fair about the Saturday assignment, Fallecker decided to let the parts counter employees decide themselves which one would work the following day. At about 2:30 p.m., Friday, Chapman and Elswick were behind the parts counter. Fallecker came by and noticed them there together. Since he was not Elswick's supervisor, he called Sheppard over to witness the assignment. He walked over to the parts counter and said to Chapman and Elswick that since he had them there together, he would like one of them to volunteer to work the following day. Elswick responded immediately, stating that he could not work because he had already made plans to go to Morgantown where his daughter was attending school. Chapman said that he could not work either because he too had made plans. Chapman did not immediately explain what his plans were so Fallecker got the impression that he was simply refusing to work. Fallecker explained that they should understand that the Company had to have someone present to cover the counter the following day, and he needed a volunteer. He added that either Chapman or Elswick was going to have to work. Elswick repeated that he could not work and Chapman repeated that he was not going to work, that he had something else to do, but again failed to explain further. Fallecker then stated that without a volunteer, he would have to decide the issue himself and appoint one of them. Both Elswick and Chapman replied that they understood but both again refused to work. Fallecker then chose Chapman to come in and work the following day and Elswick walked away.

Fallecker testified that the reason he chose Chapman to work Saturday, November 19, was because he was the only parts clerk he had left. Walker had quit. Dewey Sheppard, Sheppard's son, was in shipping and receiving, had been there only a brief period of time, did not have the technical training, and was not yet capable of doing the work. Elswick was not Fallecker's to supervise, the assignment was within the parts department and Elswick was not in that department. So the choice of Chapman for the job seemed obvious to Fallecker.

After Fallecker assigned the Saturday work to Chapman, Chapman still insisted that he already had plans and would not be there. Fallecker stated that apparently Chapman did not understand, it was no longer a matter of choice, he had to work. Chapman repeated that he was not going to work, raising his voice. Fallecker threatened that Chapman would be there "or else." Chapman replied, "Or else, what?" Fallecker then asked if that was Chapman's final decision, because if he was refusing to work, then Fallecker had some management decisions to make. Chapman asked Fallecker what he meant and Fallecker replied that Chapman should state whether or not he was refusing to work, then he would make his decision as to what he would do about it. Chapman, by this time was yelling at almost the top of his lungs, "Well, I'm not going to work," and apparently asked what Fallecker intended to do about it because Fallecker said, "We'll cross that bridge when we come to it," and Chapman replied, "We'd better find a way across that bridge because I will not be here."

The argument continued in this fashion, Chapman shouting and swearing at Fallecker. A lot of people were present in the parts department, though none, at the time near the parts counter. Others were up front in the reception area, back in the shipping and receiving area, and in the shop clerk's area. Fallecker tried to calm Chapman down. He told Chapman not to yell at him. Chapman replied that Fallecker was not his father and if he wanted to yell at him, he would. Fallecker continued to try to calm Chapman down and to avoid making a scene. He walked into his office and invited Chapman to follow him in. He told Chapman that they had to talk and that he had to calm down. Chapman refused to go into Fallecker's office.

Sheppard had left earlier to answer a phone call but at this point he was coming back around the corner and down the hall to where the argument was in progress. He tried to coax Chapman into Fallecker's office, explaining that where they were at the time was not the place for the kind of discussion they were having. he then asked Chapman to take a sheet of paper he was holding, back into the office. Chapman refused. He told Chapman to calm down. Chapman, still refused to go into the office or calm down and, addressing Sheppard, yelled, "You don't have any business in this. You need to stay out of it. It's none of your business. You stick your nose where it don't belong. That's what's wrong with this damn place."

The argument continued out at the parts counter with Chapman yelling and swearing. He asked why Dewey Sheppard could not work a Saturday. Fallecker replied that he was not trained to handle the Saturday job. Chapman suddenly suggested, "[W]hat if it [his refusal to work Saturdays] is for religious reasons?" Fallecker responded by telling Chapman that he had already made his statement and should not try to change his story at this point. This made Chapman even angrier. He slammed something down on the counter and, in a very loud voice, said, "I'm tired of this place, I've been fucked from one end of this counter to the other." This outburst upset Fallecker. He came back out of the office from where he had been trying to coax Chapman in. He told Chapman, "Look, You're not going to talk to me that way. I won't put up with this kind of obscenity and profanity. I won't be talked to by you this way." Chapman retorted, "You're not my dad." Fallecker responded, "I'm glad I'm not, I don't want to be your dad."

Just then, the receptionist called that a customer was coming back. Sheppard told Chapman to calm down and take his discussion with Fallecker to the back. Fallecker again tried to get Chapman to come into his office. Once again, Chapman refused, stating that he was not going into the office and was not going to calm down, adding that it was about time the customers knew what the hell was going on around there. He said that he was tired of the lies and that Sheppard was part of the "damn" problem. By that time the customer had reached the counter and Fallecker came over to wait on him. Just then, Chapman happened to look at Sheppard and it appeared to him as though Sheppard wanted to hit him. He told Sheppard to go ahead and hit him, that the "Kanawha County jail was full of fucking people like him." Both Fallecker and Sheppard continued to try to get Chapman to calm down and to continue the argument/discussion inside Fallecker's office but Chapman still refused to go in.

About this time, the telephone rang and Chapman took the call because it was about parts. The customer was still standing at the parts counter. Fallecker apologized to him and waited on him, then left the office area. Chapman, in the meantime, calmed down, and took the phone order and the screaming match was over.

In a few minutes Fallecker returned to his office, then in another few minutes called Chapman in and handed him an Employee Warning Report describing the incident which had just occurred. The warning report charged Chapman with insubordination and disrespect for both Fallecker and Sheppard in refusing to follow instructions to calm down and go into Fallecker's office to discuss the matter under consideration. It further charged Chapman with a public display of "insolence and profanity causing humiliation to the company." After reading the document, Chapman at first refused to sign it. He then checked the box on the form indicating that he disagreed with the Company's statement and wrote in the space provided:

> Respect is something that has to be earned. I feel Tim has had it out for me and the company has had it out for me since 11–04–94.

He then signed the document under this statement but continued to talk. Fallecker interrupted him, stating that they were finished for the time being, and that Chapman was suspended for that day and the following Monday and not to report back until Tuesday morning at 8 o'clock. In the box entitled "Warning Decision" Fallecker wrote:

> Jeff will be suspended without pay until Tues. Nov. 22, 1994 at which time he will return to work at 8:00 a.m. This is not the final judgment and further disciplinary action may be taken.

Fallecker then signed and dated the warning decision and the document.

Chapman explained that he wrote the employee statement he did because the attitude of upper management had changed since the election and because of the tension in the air.

When questioned as to why he did not discharge Chapman on Friday during or immediately following the incident, Fallecker testified that he did not want to act on impulse during "the heat of the situation" and secondly, both Lamm and Mannon were out of the office at the time and Fallecker wanted to confer with them before discharging an employee. He testified further that he wrote in the warning decision section, "further disciplinary action may be taken" because he did not care to make the decision to discharge Chapman without first conferring with Respondent's owners. Clearly, from the addition of these words, Fallecker was contemplating Chapman's discharge.

Although Chapman testified at great length giving many reasons why generally he did not want to work Saturdays—insurance coverage problems, his preference for doing chores for elderly women in his church, the long distance he would have to drive for half a day's wages, he did not mention any of these reasons for not being able to work the following day, during his conversation with Fallecker on the day he was suspended. Nor did he, as far as the record is concerned, mention to Fallecker that day anything about the purchase of the Volkswagen engine block which he intended to buy the next day and concerning which he testified about at great length at the hearing. The only specific reason he gave to Fallecker for not being able to work the next day was his belated oblique comment about "what if I said it was for religious reasons?," a clearly transparent afterthought.

Although Fallecker initially had no intention of making Elswick work Saturday, November 19, he really had no other choice. After Chapman was suspended and left the premises, Elswick volunteered to work the following day and did so along with Fallecker.

On Monday, November 21, Fallecker met with Lamm and Mannon. The incident was fully discussed and it was decided, based on all the facts, that Chapman's behavior could not be tolerated and that he should be let go. In their testimony, both Fallecker and Lamm freely admitted that they were aware that Chapman was a supporter of the Union because he wore union buttons. However, they also testified that this fact played no part in their decision to suspend, then discharge him.

On the morning of November 22, Chapman returned to work. After a few minutes Lamm called Fallecker and Chapman into Fallecker's office. Chapman told Lamm, "Let's go ahead and get this over with, we all three know what's going to happen." Lamm replied, "Yes, you're right. We can't have employees going around using profanity." According to Chapman, he had heard profanity used at the Cross Lanes facility on several occasions before, once by Lamm while arguing with one of his salesmen about his paycheck, after the salesman had quit. Both were using profanity on this occasion, while arguing at the receptionist's counter. Chapman also testified that the use of profanity was common practice there at the workplace.

According to Fallecker, at this exit interview, Chapman mentioned the problem involving the medical insurance cards when he asked Lamm if he knew what it was like to have a sick child. Lamm replied that that did not have anything to do with the situation. Fallecker testified that this was the first time he had ever heard about the medical insurance card from Chapman. Chapman left. He testified that this had been the only time he had ever been disciplined. On November 28, the Union filed a charge alleging the discriminatory discharge of Chapman.

H. *Conclusions Concerning the Discharge of Jeffrey Chapman*

The General Counsel takes the position that Chapman was a good employee with a clean record but also a staunch union supporter who had attended union meetings and signed a union card, wore a union cap, and displayed a union bumper sticker on his car. Management was aware of his prounion position, Chapman testified, because he was present when Fallecker showed and discussed with a customer the extra bumper sticker which Chapman kept in his drawer at work. Moreover, since Chapman openly wore his union ball cap and displayed on his car a union bumper sticker, starting 2 weeks before the election, it was clear to management that Chapman was prounion. Management freely admits being aware of Chapman's prounion sympathies.

In the November 1993 evaluation of Chapman's work, which was generally a good one, Fallecker noted "Good relationship with co-workers. Needs to work on relationship with supervisor [Fallecker]," "Good attendance record. Needs to understand company position on overtime [Saturday work] . . . I would like to see improvement in . . . his willingness to work overtime. . . . Needs more affordable insurance." From these notes it is obvious that Chapman made it perfectly clear to Fallecker that he did not want to work

Saturdays, perhaps because of the insurance card problem, perhaps for other reasons, but in any case there was apparently some friction about it between the two.

The General Counsel argues in his brief that at 2:30 p.m. on Friday, November 18, Fallecker "essentially set Chapman up" for discharge. He theorizes that Fallecker, knowing that Chapman was a prounion employee who did not like to work Saturdays, called Elswick in with Chapman and demanded that one of them volunteer to work the following day. When neither one volunteered, Fallecker let Elswick walk away without putting any pressure on him to work then told Chapman that he had to work "or else." The implication is that Fallecker chose to put pressure on Chapman and not on Elswick because Chapman was prounion.

The setup theory of the General Counsel gives rise to too many questions not easily answered, in my opinion. If, as the theory goes, Chapman was a known union adherent, which he was, who did not want to work on Saturdays and would probably refuse to follow an order to do so, why involve Elswick, at all? Why did not Fallecker simply order Chapman to work Saturday, then if he refused, fire him. By calling in Elswick and offering him a chance to volunteer for the Saturday assignment, Fallecker would be undermining his own setup. What if he did volunteer? No, I believe Fallecker legitimately was trying amicably to decide the issue between Chapman and Elswick, just as he had done when Walker was still employed.

Perhaps the General Counsel's setup theory includes Elswick as being one of the plotters to set Chapman up. Although there is no evidence that he was, the General Counsel's brief hints at the suspicion that Elswick was part of the setup because Fallecker put all the pressure on Chapman to work on Saturday and virtually none on Elswick. I fully accept Fallecker's explanation as to why he chose to assign the Saturday work to Chapman rather than to Elswick. In addition, I would draw attention to the fact that Elswick would hardly be the one to choose to help setup Chapman for discharge because of his union activities when, according to Brock, Elswick like Chapman, also showed himself to be a union supporter by attending union meetings, wearing a union hat around the shop and displaying a union bumper sticker on his car.

In his brief, the General Counsel states, "It is submitted that Respondent's discharge of Jeffrey Chapman was part-and-parcel of its wider program to rid itself of union activists as demonstrated by its conduct regarding the other discriminatee herein." Although I agree with the General Counsel that Respondent did, indeed, have a "wider program to rid itself of union activists," I also find that Chapman's behavior on Friday, November 18, was deplorable and was just grounds for discharge. I find that his conduct on that date was a legitimate cause for discharge, was the reason for his discharge and that he would have been discharged for such conduct whether or not he had been engaged in union activity.[15]

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981).

I. *The Disciplinary Warning to and Layoff of Carl Brock*

A review of the facts in this decision to this point clearly reflects Brock's involvement in union activity from almost the very beginning. On July 21, Westfall's first day back on the job following his suspension, he enlisted Brock to talk to the other employees and advise them of Westfall's efforts to schedule a union organizational meeting. After Brock talked to four or five employees as requested, Bailey approached Brock and interrogated him as to whether he had heard anything about a union. I have found this interrogation to be both unlawful in itself and evidence of management's knowledge of Brock's union activity.

The facts further reflect that Brock attended the first organizational meeting and all the others thereafter and was one of the first of Respondent's employees to sign a union card. He was the first employee to display a union bumper sticker and decals on his car. He parked his car right at the corner of Respondent's building where it could easily be observed in the parking lot.

When the Union filed its charge on behalf of Westfall, it included the 8(a)(1) allegation based on Bailey's interrogation of Brock. Thus, Respondent was made aware of Brock's cooperation with the Board and the Union in the investigation of the Westfall discharge.

Later, Brock met with Smith and advised him of the organizational activity among the employees. He spoke in favor of the Union and furnished him with a union card which he signed. Similarly, he invited Landes to attend a union meeting which he eventually did.

The several paragraphs appearing immediately above reflect record evidence of Brock's union activity and Respondent's knowledge thereof, described in earlier sections of this decision, for the most part, in connection with various incidents, covering other allegations contained in the complaint.

With regard to the employment history of Carl Brock the record indicates that he was first employed by Respondent in October 1993 as a heavy equipment mechanic with a specialty in diesel engines. His experience included over 20 years working with diesel engines as well as 10 years' experience working in hydraulics and with tractors, transmissions and transaxles. He also did welding and road work troubleshooting while employed by Respondent.

After obtaining employment with Respondent, Brock testified, he was assigned a number of important jobs to perform. One such job was located in Cumberland, Maryland where he worked on equipment belonging to C. J. Hughes, Respondent's best customer. The job involved the transmission in a Hughes backhoe which Brock was sent to inspect in order to determine whether it was going to be necessary to replace it. He went into the engine of the backhoe, analyzed the problem, determined what damage had been done and repaired it successfully without assistance from anyone. While there in Cumberland, Brock worked on the brakes of another piece of Hughes equipment. The assignment was described by Brock as part of rebuttal testimony to indicate that Respondent trusted Brock to perform troubleshooting on the road, a type of assignment performed by the superior mechanics only, because they must rely, for the most part, on

their own mechanical knowledge without the aid of books or supervision.

On another occasion Brock was sent to Morgantown, West Virginia, to work on the hydraulic cylinder which operates the boom on an excavator belonging to one of Respondent's customers. Brock was accompanied on this trip only by a helper to provide additional physical labor.

In his work around the shop, Brock built and rebuilt diesel engines belonging to both Respondent and its customers, rebuilt shuttles for C. J. Hughes and transaxles for Burnette, another good customer of Respondent, worked on backhoes and excavators, rebuilding hydraulic cylinders and valves. Brock performed his work alone without any major problems. Sheppard had quoted one job as requiring 60 hours and Brock got it done in 28 hours.

Brock's work was not limited to engines but also included work on the external moving parts of the various pieces of equipment. He often worked on the tracks and idlers, removing the tracks, checking the rollers and idlers, and rebuilding whatever was needed underneath.

Prior to the advent of the Union, Brock had never been disciplined. On the contrary, both Sheppard and Bailey came around, told him he was a good worker and praised him for getting along well with the other employees. In April he was given a raise of 50 cents per hour which he regarded as a merit increase because he was graded at the time.

During his employment with Respondent, Brock was twice offered jobs in other cities, namely, Clarksburg and Beckley. The Beckley job required working both in the shop and on the road. Both jobs would have involved more responsibility, therefore probably more money. Brock turned down both offers because his family was established in the Charleston area and he did not want to relocate. Despite his turning down the offers, they nevertheless indicate an appreciation for his work.

The complaint alleges that on November 10, Respondent issued a written warning to Brock because of his union activities in violation of Section 8(a)(1) and.(3) and because he gave testimony to the Board in violation of Section 8(a)(1) and (4). The record indicates that Brock was, in fact, issued a formal Employee Warning Report on that date based on an incident which had occurred at 4 p.m. on November 9. The company statement reads:

> Re: Work Order #9271
> While installing the blade back to the C-Frame on a 850G Dozer, Carl failed to install the through bolt in the self-aligning bearing, this caused the blade to fall from the C-Frame. Carl was then questioned.
>
> Q. Did you forget to install the bolt?
>
> A. I put back what I took loose (after investigation it was determined that he did remove the bolt and hard washer.)
>
> Q. Have you been instructed to use a shop manual during any assembly?
>
> A. Yes.
>
> Q. Did you use a shop manual?
>
> A. No.

The employee statement was filled out by Brock. He checked the box which states, "I concur with the Company's statement." He also signed and dated the document November 11, 1994.

In the box entitled "Warning Decision" Mannon wrote:

> Employee is reprimanded for failure to comply with instructions and established procedure, to follow shop manual, and for carelessness. Employee is placed on probation for one hundred twenty (120) days and admonished that further acts of similar nature may result in discharge.

Mannon signed and dated this section of the document November 11, 1994, as approved. Brock signed the "Warning Decision" where it states, "I have read this 'Warning Decision' and understand it." Sheppard signed the document as the person who prepared the warning.

With regard to the November 10 written warning, Brock testified that he had, indeed, left out the drop through bolt when he reassembled the dozer. He explained that he left it out because it was not there to begin with and he did put back all the parts that he had taken out. He admitted, however, that had he used the manual, as he should have, he would have noticed that a bolt was missing and that he should get one and insert it to reassemble the machine properly.

After reassembling the machine Brock turned it over to Bailey to check out. When Bailey tried to push the blade down into a pile of dirt it came out of alignment because of the missing bolt. No damage was done.

When Brock was given the written warning for failure to assemble the dozer correctly, he testified that he did not feel that he deserved it. He admitted checking the box indicating that he concurred with the company statement because he generally agreed with the facts as stated therein, but did not feel that the facts warranted the disciplinary warning he received. He testified that there had been many incidents involving other employees who had made mistakes which cost the Company money and those employees never received any discipline. He also testified that he had made mistakes before the union campaign began and had received no discipline. He gave several examples of these incidents and argued that he only was disciplined for this particular mistake because he had supported the Union.

Examples of errors or mistakes made by other employees, similar to Brock's, for which there was no discipline include, according to Brock:

> A winch supposed to have been repaired by Bailey and Jordan which was sent back to Respondent's shop from the job to which it had been sent because it was not properly repaired.
>
> Times when Brock had left parts off a machine because Respondent was in a hurry to get it out of the shop and rented.
>
> One incident when a customer came to pick up his machine and it had a hose leaking on it, Brock had to replace the hose.

When Brock made minor mistakes such as these prior to the start of the union campaign, Bailey would tell Brock to go ahead and fix whatever was wrong with his repair work. No discipline was ever involved.

Other mistakes for which there had been no disciplining of the employees involved were:

> The incident involving employee Herb Marcinik who had repaired and reinstalled a transaxle without properly checking the clearances of the gears. The result was that when the equipment was sent out to the customer's jobsite, the transaxle made a lot of noise, had to be brought back to Respondent's shop and rebuilt. The time lost was two or three days.
>
> A day and a half after Brock received his disciplinary warning, one of the road mechanics, Gene Cassel, loaded two five-gallon buckets of oil onto his service truck, then drove it out onto Golf Mountain Road. However, he forgot to close the tailgate on his truck and the oil came out the back of the truck. Sheppard and another employee had to be sent out to collect and clean up the oil.

Respondent called no witnesses and offered no documentary evidence to rebut Brock's testimony concerning the disparate treatment he received at the hands of Respondent compared to the treatment of other employees as reflected by the November 10 disciplinary warning. In the total absence of any evidence to the contrary, I fully credit Brock's testimony on this issue and find that the issuance of the disciplinary warning was discriminatorily motivated and therefore in violation of Section 8(a)(1), (3), and (4) of the Act.

According to Sheppard, in late October, management became aware that internal expenses were exceeding income from customer retail work. In November, Sheppard testified, it was decided to take an actual count of the number of retail jobs done for customers and the number of internal jobs done for Respondent and to arrive at a percentage. This was done and it was determined that there were far more internal company jobs than jobs done directly for customers. As a result of these findings, Sheppard met with Lamm and Mannon, and it was decided that internal expenses had to be reduced and these could best be reduced for the short haul by putting off work on company machines that could be conveniently delayed to a later date. An example would be work to be done on used company machines for sale. Work on these could be put on the back burner for the time being, to be repaired later, or sold as is.

Sheppard testified that the company keeps daily records of the jobs done. The daily records are kept on regular forms and reflect the job number, customer's name, make, and model of equipment, problem, and dates the job was opened and closed. Each page of the records kept was an identical form with this information contained on it and had space for 10 jobs, listed in both numerical and chronological sequence. Some of these records were kept by the shop clerk and some in a file in the main office.

According to Sheppard, a survey of these records was taken which reflected that a larger percentage of the total number of jobs performed was for internal work than for customer work. Respondent offered an exhibit,[16] consisting of a summary or cover page and several pages of the records, purportedly for the purpose of reflecting the findings and results of the survey. The summary sheet indicates that for the months of November and December there were 194 new orders opened consisting of 135 or 70-percent internal jobs or work orders and 59 or 30-percent customer jobs. These percentages, Sheppard stated, were bad because repairing and servicing the Company's own equipment does not result in immediate income from customers but only in internal billing. Percentage of internal billing is usually 35 to 40 percent and should be kept down to that figure.

Ray Mannon testified that he was the individual responsible for the cover sheet on the exhibit and that the document is in his handwriting. He drew attention to the fact that the attached records contain work orders in sequential numbers and dates on which each work order was opened and closed. He testified further that the documents of which the exhibit is composed are documents which are kept in the regular and normal course of business. He specifically denied that they were made for purposes of the hearing.

Mannon then read into the record the summary on the cover sheet and explained that since the Company's cash flow comes from its customer work, when that percentage drops, management must look for ways of cutting costs. Mannon testified further that similar comparisons of customer work orders and internal work orders had been made in the past and percentages noted, that when the percentage of internal work orders got too high, costs were cut by delaying work on internal projects to a later date.

By way of voir dire examination, the General Counsel asked Mannon a series of questions concerning the exhibit. In answer to these questions, Mannon reiterated that the exhibit covered the period November and December as stated on the cover sheet. He testified that management started its evaluation of the situation in November but since the exhibit was not completed until the end of December, it was not available for consideration as of December 2. Although the exhibit, as offered, was not available as of December 2, the daily entries of work orders, prior to December 2, were available for inspection prior thereto and, according to Mannon, he could tell the circumstances of the company as of December 2 and before, by observing these entries in October and November.

The exhibit offered, was received over the General Counsel's objection to its relevance but proved more relevant to the General Counsel's case than to Respondents'. First of all, although its cover page summary purported to cover the months of November and December, the actual pages of work orders included jobs opened in October, November and December. Second, whereas the summary of the exhibit purports to cover 194 orders, 135 of which are internal jobs, the actual number of work orders included in the exhibit number only 70, some internal jobs and others, customer jobs. With only 7 pages or 70 work orders included in an exhibit which should contain 19.4 pages or 194 work orders, that means 124 work orders were deleted, making it impossible to rely upon the exhibit for the purpose intended. Third, the work orders which were included in the exhibit were for work orders opened on October 3, 4, 20, and 21; November 3, 4, 8, 9, 16, and 17; and December 7, 8, 9, 29, and 30. If the missing pages had been lost or left out by mistake, most probably it would have been a single continuous set of dates or perhaps two at most, for example, the period October 15 through November 10. However, the exhibit offered here reflects more an attempt to choose from otherwise le-

[16] R. Exh. 4.

gitimate records, just those pages most beneficial to a preconceived purpose. On this basis, I find the exhibit, as presented, a document specifically prepared for trial, after the December 2 layoff, for the purpose of affording Respondent a pretext for that layoff. I do not, of course, rely on this exhibit for the purpose offered but do rely on it as support for the General Counsel's theory that the use of these records was pretextual, offered to hide Respondent's unlawful motivation for laying off another prounion activist from among its complement of employees.

The question, of course, comes to mind, why Respondent should rely for its defense of the December 2 layoff on such a convoluted financial argument as it does, i.e., percentage of internal jobs as opposed to customer jobs. The answer lies in the fact that there was no other financially based pretext available since Mannon freely admitted that business had continuously increased—'92 over '91, '93 over '92, and the biggest increase of all in '94 over '93. Thus, Respondent was precluded from using the classical financial pretextual defense in unlawfully motivated layoff cases.

Sheppard testified that once it was determined that an imbalance existed between the number of internal versus customer jobs, what management would do to offset this imbalance was to cut back on the labor hours, to cut back on the number of employees. Sheppard admitted that similar situations had occurred in the past and that, on those occasions, Respondent would not lay off employees[17] but would, in the alternative, cut employees hours to three or four days a week and that way keep them all employed. He admitted further that he had followed that procedure in January 1993 but did not do so in December 1994 because he had heard a lot of grumbling from some employees who felt that they would be better off being laid off than working 4 days a week because working 4 days could not get a low earning statement. Sheppard did not specifically identify any of the grumblers and I do not credit his testimony.

Sheppard testified that once management had decided, on the basis of the survey, that a layoff was the proper course, it had to be decided how many and which of Respondent's employees should be laid off. In mid-November, while the survey was still purportedly proceeding, Sheppard laid off John Napier, a general shop laborer who did oil changes and helped the mechanics. He had attended union meetings but apparently had not outwardly manifested union loyalty through the wearing of union buttons or hats or the displaying of union bumper stickers. His layoff is not alleged as violative.

Sometime between the layoff of John Napier and December 1, Sheppard testified, it was decided that three more employees should be laid off. These would be mechanics. In order to decide which mechanics to lay off, Sheppard divided them into three groups, in accordance with their qualifications. From within each group, Sheppard would decide, he testified, how many mechanics were needed by the Company. Then, he would choose by seniority which mechanics to lay off.

[17] Sheppard testified that there had been a few lay offs in prior years but did not testify in detail about the circumstances nor identify who was involved. Mannon also stated that there had been layoffs in the past but could not name individuals or supply dates. As noted, supra, when hired, Westfall had been assured that Respondent did not lay off but only cut hours.

Sheppard testified that the most skilled mechanics were in the first group. These were the class AAA mechanics; field men who would be able to do anything Sheppard wanted them to do, in the field or in the shop. In the second group were the class AA mechanics. These were mechanics who would be able to do anything Sheppard wanted them to do in the shop with a minimum of supervision. In the third group were the class A mechanics. These were mechanics who would be able to do minor repairs and services such as oil changes, brake jobs, and packing hydraulic cylinders—nothing technical.

In the class AAA group, Sheppard put Ron Ward, Terry Jordan, and John Bailey. In the class AA group he put only Gene Cassell. In the class A group, he put Herb Marcinik, Bob Hunt, Kenneth Napier, and Carl Brock. Sheppard testified that he put Brock in class A, because he was trusted to do brake jobs on backhoes, pack cylinders, do water pumps, and perform general mechanic duties.

When Sheppard was examined as to when he first came up with the AAA, AA, and A mechanic classifications, he testified vaguely that he guessed that it was something they had been working on for a year but did not know actually when they had begun doing so. When examined as to when he first put this classification system into effect, whether it was after the election, he could not come up with an answer but simply stated that he knew that at the time of the hearing it was posted on the bulletin board at the shop and may have a date on it. He testified that he believed it had been posted before November 1994 but did not know.

On December 1, Sheppard had a meeting with the employees to discuss with them the forthcoming layoff. He told them that he was looking for a way to cut back on labor hours. He told them he was asking for volunteers to take layoffs or to use any vacation time they had coming. Subsequently, Bob Hunt volunteered for layoff and several employees volunteered to take their vacations. When Hunt volunteered for layoff, that left only two additional employees to choose for layoff to reach the four that had been planned.

After Hunt volunteered for layoff, Sheppard decided to choose two more from group A for layoff. In seniority, Hunt was the oldest employee with Kenny Napier next oldest. Since Brock and Marcinik had the least seniority in the class A group, Sheppard chose them for layoff. He specifically denied that Brock's union activity had anything to do with the decision to lay him off although he was aware of his prounion sympathies. Sheppard did not lay off anyone in the class AAA or class AA groups.

The General Counsel called Carl Brock as a rebuttal witness. He testified that it struck him as strange, that Sheppard would classify him as a class A mechanic, an employee limited basically to duties such as grease jobs and oil changes when, in fact, he had done the kind of intricate mechanical work described earlier in this decision. Otherwise, his description of what occurred at the December 1 meeting was, in general, in agreement with that of Sheppard. With regard to the amount of work available at that time, Brock testified that he stayed busy doing both customer work and work on company equipment.

On December 2 at 4:25 p.m. Brock was called into the office where Sheppard and Lamm were waiting to see him. They told him that he was being laid off, that it would be temporary but they did not know when he would be recalled,

if at all. He left. Marcinik, another employee classified as a class A mechanic, was also laid off that day.

Lamm, who was present at Brock's exit interview, and who by being present gave, at least, tacit approval to his layoff, testified that members of management had discussions prior to the layoff concerning the reduced percentage of customer work orders relative to internal work orders in the shop and that Respondent needed a manpower reduction because of it. Lamm supported Sheppard's earlier testimony that it had been decided that a reduction of four would be necessary and that this was accomplished with the layoff of John Napier 2 weeks earlier, the voluntary layoff of Bob Hunt and finally the layoff of Marcinik and Brock. Lamm testified further that although he was aware of Brock's support for the Union, that played no part in his authorization of his layoff. He also denied that prior union activity of Respondent's employees had anything to do with the decision to cut back on the work force. He stated that out of the four who were recently laid off, only Brock was a known union activist. In actuality, however, according to Brock, both Bob Hunt and John Napier attended union meetings and Hunt displayed union stickers on his truck.

Brock testified that on December 2 when he was laid off, three mechanics remained employed who had less seniority than he. These were Ray Ward, Terry Jordan, and Gene Cassell. Brock testified that none of these three employees performed any work that he was incapable of doing, including road work and that he was just as qualified as they were.

Westfall was called by the General Counsel to testify as to the comparable abilities of Ward, Jordan, Cassell, and Brock. He stated that Ward was a field service mechanic with whom he worked occasionally over a period of about 8 months. Similarly, Westfall testified that Brock was an equipment service mechanic like himself. He described him as a good mechanic who did whatever work he was assigned to do. He stated that he worked together with Brock in the same shop for a year and a half, sometimes on the same projects. When working on separate projects, they usually worked in close proximity since the shop was small. Asked to compare Ward's ability and job performance to that of Brock, Westfall testified that they could both do the job and one was no better than the other. Asked to compare Brock's ability and work performance to that of Jordan, Westfall testified that Brock had quite a bit more experience with Respondent's type of equipment but both were good mechanics.

At the first hearing, the General Counsel requested Brock to read off the names of the employees whose names appeared on the eligibility list and to identify those individuals who supported the Union, those who rejected it and those who showed no sign. He was also requested to identify those employees who were still employed after the December 2 layoff and those who were not. Brock offered the following testimony:

> Johnny Bailey, the shop foreman, admitted supervisor.
> Antiunion: Bailey had stated that Respondent just did not need the Union.
> Still employed.
>
> Gene Cassell
> Antiunion: Wore a "Vote No" button.
> Still employed.
>
> Joseph Cottrel[18]
> Prounion: Attended union meetings, wore a union cap and displayed union stickers on car and on tool box.
> No longer employed. Though still employed as of December 2, Cottrell was separated some time thereafter.
>
> Virgil Elliott
> Antiunion: Wore a "Vote No" button.
> Still employed.
>
> Robert Hunt
> Prounion: Attended union meetings, displayed union stickers on truck.
> No longer employed.
>
> Bernard Morrison
> No indication
> Still Employed.
>
> Kenneth Napier
> Prounion: Attended union meetings. No visual support.
> Still employed.
>
> Jason Sheppard
> Antiunion: Wore "Vote No" button.
> Still employed
>
> Ronald Ward
> Antiunion: Wore "Vote No" button.
> Still employed.
>
> Jeff Chapman
> Prounion: Attended union meetings. Wore union cap. Displayed union stickers on truck.
> No longer employed.
>
> Johnny Cremeans
> Antiunion: Wore "Vote No" button.
> Still Employed.
>
> William Elswick.
> Prounion: Attended union meetings. Wore a union hat. Displayed union stickers on his car.
> Still employed.
>
> Terry Jordan, Sr.
> Antiunion: Wore "Vote No" button.
> Still employed.
>
> John Napier
> Prounion: Attended union meetings. No visual support.
> No longer employed.
>
> Dewey Sheppard
> Antiunion: Wore "Vote No" button.
> Still employed.
>
> Eric Walker
> Prounion: Attended union meetings. Signed union card. Displayed union bumper stickers.
> No longer employed.
>
> Gary Waugh
> Antiunion: Wore "Vote No" button
> Still employed.

To summarize Brock's unchallenged and credited testimony, the above information reflects that he identified 16 rank-and-file employees by their union preferences, 7 as prounion, 8 as antiunion and one as neither.

[18] Cottrell was unlawfully discharged on October 10, 1995.

All eight of the antiunion employees, those wearing "Vote no" buttons and the neutral employee were still employed as of the date of the original hearing. Of the seven prounion employees, only two were still employed as of the date of the original hearing and only one of them outwardly displayed his support for the Union.

These statistics might be shrugged of as pure happenstance proving absolutely nothing. However, when surrounding circumstances are also considered, these statistics support a circumstantial finding that the erosion of union strength was not a matter of pure chance. Thus, when Sheppard decided to lay off four employees, he laid off John Napier, a prounion employee first, then placed the mechanics in categories, ostensibly according to their proficiency but actually in accordance with their loyalty. Thus, he chose his shop foreman and supervisor, John Bailey, and two loyal "Vote No" button wearers, Ward and Jordan to put into the class AAA category. Then he chose another "Vote No" button wearer, Cassell, to put into the class AA category. Finally, he chose to place three prounion employees Brock, Kenneth Napier and Hunt and one uninvolved employee, Marcinik in the lowest category. The system of categories and the placement in each clearly reflects a reward and punishment strategy to reward the loyal "Vote No" employees at the expense of the prounion employees and to make the latter group, Brock in particular, vulnerable by removing the protection he had previously enjoyed based on seniority.

Shortly after their layoff, Marcinik and Brock were recalled to do some cleaning up of the toolroom and some painting . It is not clear from the record whether the recall occurred before or after the filing of the charge by the Union on Brock's behalf on December 12. Brock reported and worked 2 days cleaning and painting but did no mechanical work. He had not quite completed the work of putting back the tools after painting when he was again laid off and told by Sheppard that if he needed Brock again, he would call him. He was not called.

The recall for 2 days of laboring work was probably sent after the charge was filed, because it was sent by certified mail rather than by a simple telephone call, probably for the purpose of making a record, just in case the offer of recall were refused, thus tolling any backpay due. Sheppard testified that he did not thereafter recall, Brock because he had no need for additional employees, only to replace a road man who quit. The parties stipulated at the hearing that on March 6, 1995, Respondent hired a new employee, Harry Marks, as a road mechanic.

About May 9, 1995, Respondent placed an ad in the Charleston newspaper for two mechanics, one for Beckley and one for a field mechanic's job in Charleston. Brock testified that he was qualified to do the field mechanic's job in the Charleston area. The primary difference between a field mechanic and a shop mechanic is that a field mechanic must be a little sharper in his troubleshooting ability but once the nature of the problem is determined, the mechanical capability required is the same. Since Brock had experience as a road mechanic, he felt qualified to fill the position described in the ad. Explaining the job in greater depth, Brock testified that if a road mechanic diagnoses a problem as a particularly big one and it involves a piece of Respondent's own equipment, typically the faulty equipment would be loaded up and brought back to the shop in Charleston where it would be fixed by one of the shop mechanics. If the equipment belonged to a customer, the road mechanic would diagnose the problem and inform the customer who would then decide whether to have Respondent take it and fix it in Respondent's shop or take the equipment back to the customer's own shop for repair. No major repairs are ever done to the equipment while out on the road.

As to the Beckley ad, Brock testified that when he worked off and on in Beckley, he noted that the Beckley mechanic had "to do it all." He had to deal with customers both in person and over the phone, write up the jobs, and do everything because there is only the one mechanic and a parts clerk there in Beckley. The mechanic in Beckley was the mechanic, troubleshooter, and everything else and had to do everything without supervision including estimations on small jobs. Brock was not interested in the Beckley job because he did not want to deal with the customers or with estimates.

J. *Conclusions Concerning the Disciplinary Warning to and Layoff of Carl Brock*

From the above facts and considerations, I find that Brock was laid off from his job, because he was a known union activist and because he gave testimony to the Board in violation of Section 8(a)(1), (3), and (4). It is clear that Respondent undertook a campaign to rid itself of all prounion employees beginning long before the election with the firing of Westfall and continuing thereafter by means of the various pretexts described above.

K. *The Reprimanding and Discharge of Joseph T. Cottrell's Union Activity*

Joseph T. Cottrell began working for Respondent as a field service mechanic on April 13, 1992. As such, he worked mostly in the field. His job was to remove the component with the problem from the equipment at the site, bring it back to the shop where someone would rebuild it, then take it back, and install or reinstall it.

On September 1, 1994, Cottrell was made a shop mechanic. By that time he had over 30 years of experience doing mechanical work on heavy equipment.

Cottrell was active in the union organizing efforts from the very beginning. He and Westfall discussed the possibility of obtaining union representation in early July 1994.[19] About the time of Westfall's suspension they decided to get started with organizing. After Westfall's return from his suspension on July 21, he told Cottrell and Brock that he was trying to schedule an organizational meeting. The meeting was subsequently scheduled for August 2 or 3,[20] but Cottrell was out on the road when the meeting was held and did not attend. After the meeting, in the evening, Eric Walker brought a union card to Cottrell's home where Cottrell filled it out, signed and probably misdated it August 2. Walker also gave Cottrell a pamphlet and four UMW Solidarity Team decals. He affixed one decal to the window of his truck and another to the window of his wife's van the following day. Two or

[19] Hereinafter, all dates are in 1994 unless indicated otherwise.

[20] Cottrell testified that the meeting was held August 2 while other witnesses testified it was on August 3.

three days later he affixed the third decal to the lid of his toolbox.

Cottrell attended a second union meeting in August, this one at Westfall's home. These he was given two UMW bumper stickers. He affixed one to his truck the night he got it, the other to his wife's van the following day, both to the rear bumpers. Eventually Cottrell replaced his truck but put a new union decal and bumper sticker on the new truck. He wore a UMW baseball cap to and from work and kept it on his dashboard while inside the shop working. He parked his truck by the garage doors facing the building. He continued to wear the hat from before the election until he was fired. As of the date he was fired, only he and Carl Brock, who had been recalled, were still displaying union paraphernalia.

On April 5, 1995, during the first hearing, Carl Brock testified concerning the extent of Cottrell's involvement with the Union. He fully supported Cottrell's later testimony offered during the second hearing, after Cottrell's discharge.

On October 10, Respondent discharged Cottrell. Bailey told Cottrell that it was because he took too long to rebuild the shuttle on order #10713 which he had worked on between September 28 and October 5. For purposes of discharge, Bailey prepared another employee warning report and dated it October 10, 1995. The company statement language appearing in this document closely parallels that appearing in the September 22 employee warning report:

> I have talked to Joseph several times about work performance and I have written him up once. It don't seem to have done any good. I gave Joseph a job to repair a power shuttle and do a service on a 580 E S/M 17039894 CW10713. The job should not have taken no more than twelve hours but it took him twenty six and one quarter hours. Flat rate time is about ten hours.

The employment statement space is blank. In the warning decision space, Bailey wrote:

> I have made my decision to discharge Joseph due to work performance.

L. *Cottrell's Work Performance*

Johnny Bailey testified that Cottrell was working under his supervision at the time of his discharge and that he made the final determination to terminate him. After making his decision to terminate Cottrell, he had his decision approved by Mannon. Bailey testified concerning Cottrell's work performance for well over a year in order to describe fully the Respondent's position as to why it eventually discharged him.

Bailey first discussed customer work order #8696 received from Fleming Landfill on June 23. The order concerned a job to be performed at the customer's worksite and involved the replacement of an engine, a job which Cottrell, Sheppard, and Bailey all estimated would take about 2 days. Bailey admitted that such initial estimates are always subject to change depending on developments which may become apparent as the job progresses.

As it turned out the job took several mechanics a total of 94-1/2 hours to complete. Cottrell worked on it 62-1/4 hours himself. Bailey testified that although some of the excess time could have been due to complications, not all of it could have been attributed to unforeseen and unavoidable problems arising. He felt justified, he said, in billing the customer only for 31 hours.

The actual records covering order #8696 indicate that four different employees worked on this job for 8 days and that the complications were numerous because the change was not a matter of the same model engine being removed and installed from and to the same model machine. Rather, numerous changes and adjustments would eventually be required before the job was accomplished.

Work began on the machine on June 27. Cottrell and mechanic Richard Roberts put in 7-1/2 hours each, removing the old engine, working together on that date. Complications were evident from the beginning. The serviceman's report, signed by both Cottrell and Roberts, states:

> Correction: Pull engine to bring into shop.
> Pull nose—Radiator—Hold—Floodboards—
> Disconnect lines—Had Engine up—
> Started to swing—Boom collapsed at bottom—
> Engine fell back into unit—Had to get excavator to pull engine.

Cottrell credibly testified that having his crane break and the engine fall back in the unit, then having to get an excavator to pull the engine out was not normal. This obviously resulted in considerable downtime.

The new engine, ordered June 23, was delivered June 28.

On June 29, Brock worked on order #8696 for 8-1/4 hours. Parts for the job were received that day. On his serviceman's report he listed a number of parts which he removed and number of other parts he put in including a generator and power steering pump.

On June 30, Brock received additional parts for installation in connection with order #8696. That day, he worked 7-1/4 hours on that job.

On July 1, three employees worked on order #8696, Brock for just 1-1/4 hours, Ron Ward for 8 hours, and Cottrell for 10-1/4 hours. The serviceman's report, signed by Cottrell and Ward states:

> Correction: Install engine in auto car trk—Ron Ward's boom to help install—Jack transmission up—cut blocks and bolts—start hooking up.

Cottrell testified that Ward was sent to the jobsite with his boom truck and it took the two of them 3-1/2 to 4 hours to get the engine in, because the transmission had fallen and had to be jacked up and blocked before setting the engine in place. Cottrell credibly testified that the situation was unusual and cost additional downtime.

On July 5 Cottrell worked on order #8696 for 10-1/4 hours. On that day, he wrote the following entry in the serviceman's report:

> Correction: Had to jack engine transmission up and move engine to get support bolts lined up—Have to move fuel filter—Has to reroute lines—Didn't have exhaust bolts—Fittings on air compressor have to be changed—Clean part that have to go on unit—Have to free bolts that were broke off—Have to take parts off old engine.

Bailey admitted that when the quote was made, the necessary additional work described in this notation could not have been foreseen but stated that such is not unusual and that is why quotes are made a little high.

Cottrell testified concerning the July 5 serviceman's report that it contains comments reflecting extra work that had to be done to change the engine. In particular, he testified that the comments indicating that "he had to move the fuel filter" and "reroute the lines" and that he "didn't have exhaust bolts" and that "the fittings on air compressor have to changed" all reflect extra work. He testified further that where his comment reads, "Have to free bolts that were broke off," it indicates extra work in that he had to drill and tap them out.

On July 6, Cottrell worked 10 hours on order #8696. On his serviceman's report he entered:

> Had to go to Heavy Duty Parts for fittings for air compressor—Had to stop and get bolts for exhaust manifold.

Cottrell explained that the parts store where he had to go to pick up the parts was about 12 miles from where he was installing the engine. He described the other work he did that day as including the installation of the air compressor lines, the exhaust manifold and brackets, and the tightening of all support bolts. He testified that a job assignment does not usually include having to drive to a parts store for parts that usually are present at the job site and that this added to the extra time spent and billed to the job.

On July 7, Cottrell worked 10-1/4 hours on order #8696. On his serviceman's report he entered:

> Correction: Move fuel filter bracket—Had to remake filter bracket—Realign trunion mount—Tighten all fan belts—Finish wiring up unit—Install radiator—Nosepiece—Grill—Hook up . . . wire—Plug 2 oil ports—Had to move tee for fuel return . . . . Make up bottom radiator hose and . . . . Install grnd strap—Install fan blade—Heater hoses—

Cottrell credibly testified that moving the fuel filter bracket, remaking the filter bracket, realigning the trunnion mount, and rerouting the fuel lines all involved unusual additional work.

On July 8, Cottrell worked 14 hours on order #8696 and apparently completed the job.

The customer was billed for order #8696 on July 15. Between the receipt of this order on June 23 and the billing date of July 15, there is no indication that anyone in management complained to Cottrell or the other three employees who worked on this job, that he or they were not diligent in their labor while working on this order. As of early July, the Union had not yet appeared on the scene, Bailey was a shop foreman and Sheppard was the service manager and Cottrell's supervisor. Sheppard did not testify concerning Cottrell's work on order #8696.

Cottrell testified at length concerning the reasons why order #8696 took so unexpectedly long to complete. According to Cottrell, when the order was received, it was expected that the engine to be taken out would be replaced with the exact same model so that all the brackets, connections, and parts would be in the same place. This proved not to be the case. The truck was old and the original engine had already been replaced by a different model engine which now had to be replaced once again. Parts of the replacement engine were located in different places and positions than corresponding parts on the engine to be replaced. Some corresponding parts were located on opposite sides of the engine, some engine parts of one model were not on the other engine at all but mounted on the vehicle itself. The problems presented, in some cases, required the removal of certain parts of the replacement engine and their relocation elsewhere in order for the engine to fit in properly. The fuel filters had to be moved because of the way the engine was designed. With the relocation of parts, lines also had to be rerouted, hoses had to be rerouted and shortened or lengthened. Cottrell had to go to the junkyard himself or send someone to pick up parts that would have been on the truck and available if the engine had been the same. To relocate the fuel filters, Cottrell had to manufacture a fuel filter bracket himself. Time was lost sometimes while missing parts were sent for and obtained.

Cottrell's description of the unpredictable problems he faced getting the job completed was convincing and adequately supported by the notes and comments in his written reports. I credit his testimony fully.

Documentation concerning Cottrell's work on order #8696 consisting of a repair order, invoices, shop tickets, and servicemen's reports, all dated from June 23 through July 15 inclusive were submitted by Respondent. The first union activity and evidence of company knowledge occurred on July 21 with Cottrell involved. As noted in the previous section, Cottrell attended a union meeting and signed a union card on August 2 or 3. On August 3, the Union by letter, advised Respondent that it was organizing. That week Cottrell affixed the union decals to his truck and parked it in Respondent's parking lot, thus openly exposing the Union's cause. He attended other union meetings in August, affixed a union bumper sticker to his truck and a union decal to his toolbox. He wore a union cap to and from Respondent's shop, and left it on the dashboard in plain view for all to see when not actually wearing it. Meanwhile on July 29 Respondent had already unlawfully discharged Westfall.

Six weeks after Cottrell had completed his work on order #8696, he was issued an employee warning report dated August 19. This document was attached to the documentation reflecting the work done on order #8696 and together comprise Respondent's Exhibit 1,[21] offered to indicate Respondent's displeasure with Cottrell's lack of diligence in promptly completing the work on that job.

Respondent submitted over 20 copies of employee warning reports issued to employees during the period 1994 through early 1996. In each and every case, the warning was issued to the employee within a few working days of the discovery of the violation except in the case of the one discussed here—order #8696. In this case, the violation involved a job completed July 8, approximately a month before Cottrell announced himself to be a union adherent and he did not receive his warning until approximately 6 weeks after the violation, 2 weeks after displaying his union decals and bumper stickers.

[21] R. Exh. 1, admitted at the reopened hearing on March 21, 1996.

I conclude that the employee warning report dated August 19, 1994, and given to Cottrell on that date was motivated by Respondent's antiunion animus. This conclusion is based on the following facts: The convincing testimony of Cottrell as to the complicated nature of the job and the reasons it took an excessive length of time to complete it; the failure of management to bring its displeasure to Cottrell's notice at the time the job was being done; the failure of Sheppard, Cottrell's supervisor to testify at all; the timing of the notice, 6 weeks after the alleged violation and 2 weeks after management became aware of Cottrell's prounion sympathies.

Chronologically, the next job that Bailey testified about involved order #9271 for Dy-Grove, Inc. He testified that Cottrell and Brock were working on a Case 850G dozer for Dy-Grove Inc. on November 9. They were to replace the C-frame and repair a hydraulic leak at a control valve. Cottrell resealed the control valve and, according to Bailey, took it out on the lot and told him it was ready to go. The customer was on the way to get it when Bailey went out to inspect it and found oil all around the machine. After looking at it closely, Bailey decided that Cottrell had parked the dozer while it was leaking and never bothered to check for leaks. According to Bailey, it was solely due to Cottrell's carelessness that the leak was not discovered. Apparently, Bailey reported the incident to Sheppard.

According to Cottrell, on November 9, which was 5 days after the representation election, he installed a seal in the blade control valve. He checked for leaks. After doing so, he took it out to the wash rack, steamed the oil off the control valve, ran it up to operating temperature, operated the functions and parked it at quitting time. Then, on November 11 Sheppard gave him a warning for cutting an o-ring, causing a leak, and failing to check his work and find the leak. Cottrell explained to Sheppard that he had, in fact, checked for leaks and that the leak must have occurred later. He wrote his explanation on the warning form in the employee statement space but he was nevertheless given a reprimand for carelessness, put on 90 days' probation and admonished that a similar act in the future could result in discharge.

Cottrell testified that the incident was not an unusual one, that every mechanic will experience a leak once in a while. He stated that he had had such leaks in the past and had never been given a written warning for it before and neither had anyone else.

Cottrell explained that he never got to see the leak and does not know what might have happened. An o-ring might roll, it might seal for a while, for an hour or for a day before starting to leak again. Cottrell testified that a seal, once installed, cannot be checked visually because it is covered or hidden. On this point, his testimony was supported by other mechanics who testified.

Following the warning for the cut o-ring, Cottrell felt obliged to double-check all his work or have Bailey or Jordan check it for him for fear of receiving additional warnings. Prior to the advent of union activity, Cottrell had made serious errors, one costing hundreds of dollars in damage, without receiving warnings from management.

Mechanic Herbert Marcinik testified in support of Cottrell stating that mechanics frequently will cut an o-ring when putting a cylinder together, that it happens to everyone at times. Back before December 1993 when he was injured, Marcinik had cut seals and was never reprimanded or given a warning. It happened again after he returned and he was still never written up for it even though Bailey was aware of these accidents. Marcinik never outwardly manifested any support for the Union.

In light of the convincing nature of Cottrell's credible testimony and the supporting testimony of other witnesses, I find that the warning issued to Cottrell on November 11 was motivated by antiunion considerations, another example of Respondent's attempt to harass prounion employees and part of the continuing plan to build a case for the eventual discharge of Cottrell.

Bailey testified concerning a third job he assigned to Cottrell between the dates August 17 and 24, 1995,[22] involving an 855 Case loader. Bailey asked Cottrell to reseal a control valve, rebuild a cylinder, and put on a couple of hoses. According to Bailey, the job should have taken no more than 14 hours, but Cottrell took 40-1/4 hours. Bailey complained that he could not bill the customer for the time Cottrell actually took because he would lose the customer.

Bailey testified further that he talked to Cottrell about his need to speed up on this occasion but did not make out an employee warning report. He wrote a note about the incident but admitted that he never showed it to Cottrell.

Cottrell testified that the August 17–24 job concerned a hydraulic problem which was a matter of troubleshooting to figure out what was wrong. According to Cottrell, Bob Harper and Tom Bailey had worked on the problem before it was assigned to him and it was believed that they had figured out what was wrong but, in fact, they had not. When the job was assigned to him, he worked on it together with Johnny Bailey and Terry Jordan. The three finally determined the solution, repaired it, and sent the equipment out. Most of the time was taken up with troubleshooting, trying different solutions, failing, then trying all over again.

No hard copy was offered into evidence on this job, just Bailey's note. It is difficult to understand how Cottrell can be held accountable for the failure of five people to find the solution to the problem with this one piece of equipment. I find Bailey's testimony and failure to offer documentation to support it insufficient to warrant a finding that Cottrell had not performed adequately on this job.

Bailey testified to a fourth job involving Cottrell's work. On September 14, Respondent received order #10659 from Belco to repair brakes, repair electrical shorts, check the charging system, replace the fuel shut off cable, and completely service a Case 500.

By this time, Bailey had replaced Sheppard as service manager and, as such, was Cottrell's supervisor. When the order was received, he estimated that the total job should take 16 hours.

Bailey testified that the repairs were not difficult, and that he found the electrical short himself and pointed out the problem to Cottrell immediately. All the problems, according to him, should have been easy to repair.

Cottrell took 25 hours to do the job but accounted for all the time he took on the shop ticket hard copy.

On September 15, 18, 19, and 20, Cottrell worked on this order for 1-1/2, 7-1/2, 8, and 8 hours, respectively, and jotted down the following notes on the shop ticket to indicate what he had done:

[22] Hereinafter, all dates are in 1995 unless noted otherwise.

9–15–95 Jump start unit—CK out brakes—Adjusted left side—No fluid in right side—

9–18–95 Svc Unit—Change oil—air—fuel filters—Bled brakes—Master cyl. leaking—Take both side brake housings off—Check for short in Elec. System—Found short in key switch—

9–19–95 Take both brake housings off—clean. Replace left side housing & clutch—Rivet new housing on right side and half left side. . . .

9–20–95 Replace right side master cyl.—Had to take console and dash out—Pull shuttle & throttle levers—Replace missing knob on throttle lever—Ck short in neutral safety switch—Grease—Bleed and adjust brakes—Free up swing pedals—Clean & R&R clevis pins for swing—Pins were frozen halfway in—Put pins through and cotter pins—Replace fuel shutoff cable—Had to take fuel shutoff lever off pump to get broken bolt out—Ck antifreeze + 5—Adj throttle linkage—Pull diff lock off and took apart—cleaned and freed up—Reinstall

Bailey testified that the notes on the hard copy sometimes indicate more work done than appears on the original shop ticket because the mechanic discovers problems while working on the unit which were unknown at the start. He admitted that this was the case with order #10659 although much of the hard copy comments reflect normal procedures for the work originally ordered. The work done by Cottrell which was not originally ordered was added to the bill and charged to the customer.

Cottrell testified that he did everything on this job reflected in the hard copy and listed and explained fully those items appearing on the hard copy which were not part of the customer's order and which consumed more time than originally estimated. His meticulous description of the work he did on this job, I found more convincing than the testimony of Bailey and so, credit Cottrell. He stated, without contradiction, that he had never been criticized before for taking as long on a similar job.

On September 20, Bailey called Cottrell into the office to discuss the job he had been working on the previous few days. He told him that he was going to have to speed up, that although he was not expected to kill himself, he was doing a lot of loafing. Bailey testified that Cottrell had a bad habit of "just standing around, hiding behind his toolbox." He characterized Cottrell's work as very slow and stated that he could have been a lot faster if he did not hide and loaf a lot. He also testified that Cottrell would visit people all day long, on and off, and that there was no way he could bill this time to a customer.

Bailey testified that Cottrell had always "kind of loafed around" but in the last year of his employment had really gotten worse. It became more evident when he was taken off the road and brought back into the shop.

During the September 20 discussion, Cottrell tried to explain that the job involved a complete brake job including removing and reinstalling the entire brake system. In addition, Cottrell said, he found a short in the starting system and had to replace a couple of switches. Despite his explanation, Bailey, 2 days later, gave Cottrell a warning.

During this or one of the other conversations between Bailey and Cottrell about his working too slow, Cottrell informed Bailey that he was 52 years old and was working as fast as he could but would try to do better.

After Cottrell left the office following the reprimand, he told the shop foreman, Terry Jordan, about it. After finishing the story, he commented to Jordan, "Well, they wrote me up for being too slow; I'll just get slower." Subsequently, Jordan reported Cottrell's comment to Bailey, who testified that it entered into his ultimate decision to terminate Cottrell.

Cottrell testified that he considered being written up for being slow ridiculous in light of more serious things that occurred around the shop. He said he made the remark sarcastically and had no intention of slowing down and did not do so.

Respondent produced another witness to testify to Cottrell's apparent attitude. Johnny Creamons testified to an incident which he stated occurred a month or two before Cottrell's discharge. On this occasion, Cottrell complained to Creamons that management was on him about being too slow. He told Creamons that he did not have to worry, however, because the Union would protect him. Cottrell could not recall making this statement but testified that he may well have done so.

Though this testimony apparently offered as evidence of an intentional slowdown and a tendency toward confrontation, I find it, rather, a mere reflection of Cottrell's personality and attitude in the face of Respondent's antiunion campaign. His admissions favor his credibility.

The September 22, 1995 warning which Bailey gave Cottrell states:

> I talked to Joseph several times about spending too much time on just about every job I give him. I talked to Joseph on 9–20–95 about spending too much time on a 580C he was working on. After I left, Joseph told my shop foreman, Terry Jordan, that he may get slower. The 580C that Joseph was working on should not have taken more than 16 hours but he spent 25 hours on that job. I only billed 17 hours on that job.

Cottrell did not write anything in the "Employee Statement" space but after reading the above simply stated that it was nothing but BS, then signed it to avoid an argument, and walked out.

In the space entitled, "Warning Decision," Bailey wrote:

> If Joseph Cottrell's work performance does not change, I will have to take further action.

Bailey signed the warning himself.

Aside from the job for which he received the September 22 warning, Cottrell testified that he may have been slowed to some degree in his work because over his last several months, he was assigned more technical jobs that he had not been required to do in the past. He was required, in one instance, to rebuild a Case shuttle, something he had never done before. Another job involved a final drive on an excavator. In these cases Cottrell would have to go by the manual, step by step, to get the job done correctly. This would take more time than the jobs he was used to being assigned.

Other mechanics were called to testify concerning Cottrell's work habits, speed and any changes evident over time. Their testimony was generally mixed.

Carl Brock testified that when he worked for Respondent he worked with Cottrell a lot, both before and after the Union's organizational campaign. He described Cottrell's work speed as always being between medium to slow and that it never changed. That is the way he worked prior to the Union's campaign as well as during the campaign. After Brock was recalled in August 1995, he worked for Respondent until February 1996, again along with Cottrell. During that period too, for as long as he worked there, Cottrell worked at the same medium to slow pace without change. Mechanic Herbert Marcinik testified in support of Brock's description of Cottrell's work pace.

Brock also testified that jobs would sometimes take longer than anticipated for mechanics other than Cottrell. This was due to having to wait for tools, or for help from a fellow worker. At other times mechanics would be called away from their own job to help others. The reasons for delays and the time lost because of delays are not reflected in the job tickets because the mechanics do not punch on and off jobs for these 15–20 minute delays. Herbert Marcinik testified similarly.

Bailey testified that he had talked to Cottrell several times before his discharge about picking up his speed and, as noted, had given him a written warning on September 22. On September 27, Respondent received customer work order #10713 to rebuild/replace the power shuttle on a Case 580E piece of equipment, to make other repairs and to service the machine as necessary. Bailey testified that he assigned the job to Cottrell and that he spent excessive time on this job and that this was the reason he decided to discharge him. According to Bailey, Cottrell should have been able to do all of the work necessary on the shuttle in 6 hours. Instead, the hard copy reflects that he spent 15-1/4 hours the first 3 days and by Bailey's estimate, probably 5 more hours on October 3 and 3 more on October 4 on the shuttle alone. Bailey complained that there was no way he could bill this kind of time to the customer.

In support of Johnny Bailey's testimony, Respondent called his brother, road mechanic Thomas Bailey who testified that the first time he rebuilt a shuttle, it took him 2-1/4 hours. The last one he did, took him just 1-3/4 hours. No documentation was offered to support Thomas Bailey's testimony.

Thomas Bailey also testified as to Cottrell's speed as a mechanic. Though a road mechanic, he spent about half his time working in the shop, sometimes with Cottrell. He characterized Cottrell as real slow and stated that he stood around a lot, "stood by his toolbox and . . . smoked cigarettes." Thomas Bailey started working for Respondent August 7 or 8, 1995.

I found Thomas Bailey's testimony less than convincing, not only because of the limited experience he had in Respondent's shop and very limited time to observe Cottrell's work habits but also his tendency to express his observations in the exact same language as his brother, for example, "Cottrell stood around a lot," "stood by his toolbox."

The records indicate that Cottrell began working on order #10713 on September 28. He worked 1 hour that day, 6-3/4 hours on September 29, 7-1/2 hours on October 2, 8 hours on October 3, and 3 hours on October 4 for a total of 26-1/4 hours. The hard copy indicates that he performed the following tasks:

9–28–95 Start pulling shuttle.

9–29–95 Pull shuttle out—Tear down—Clean parts—Started putting back together.

10–2–95 Rebuild shuttle—get ready to install.

10–3–95 Tap forward clutch pressure port and install plug—Install shuttle—svc unit—Change air fuel—oil—filters—Replace 3 light switches for work lights—hazard light.

10–4 or 5–95[23] Repair wires going to backup alarm—Finish filling shuttle—Replace left side lift cyl. line—Finish greasing backhoe—Adjust brakes—Run unit & get hot—Ck for leaks & operation—Take old decals off side panels.

Although Cottrell appears to have spent most or all of the first 3 days pulling out, rebuildin,g and installing the shuttle, the last 2 days appear to have been spent, for the most part, servicing and working on other parts of the vehicle.

Cottrell credibly testified that when he was assigned the job of rebuilding the Case 580E shuttle, he advised Bailey that he had never done it before[24] and would have to go by the manual.

Although the records indicate that three other mechanics worked on this order and together put in twice as much time on it as Cottrell, Bailey testified that most of Cottrell's work was on the shuttle while Jordan spent 10 hours welding the cutting edge of the front bucket and Napier and Hunt, working in the body shop, sanded, painted, and replaced a window, spending 45-1/4 hours on the vehicle altogether.

Cottrell testified concerning his work on order #10713 in a manner similar to his testimony concerning previous orders about which Bailey complained. He reviewed each task he had included on the hard copy, described them and indicated how long each one took. Cottrell said he worked 10 or 12 hours on the shuttle itself and was slowed down on this work by having to wait for someone to come down and answer some of the questions he had when he was not sure that he knew precisely what he was doing due to inexperience.

Cottrell's description of his work on order #10713 was convincing, and I credit it as truthful and accurate.

Cottrell testified that aside from the fact that he had no experience rebuilding a Case 580E shuttle and had to work with the manual, the job was slowed down by interruptions. He explained that while he was working on the shuttle, the whole job was moved out of the bay in which he was working in order to make room for another job which had been given priority. After the second job was completed, Cottrell and the shuttle were moved back into the bay where work again continued on the shuttle.

When Cottrell finished working on the shuttle he was not immediately discharged. He finished out the week presumably performing work on other projects. He was still employed as of October 9 and was engaged in changing the backhoe controls and greasing the backhoe on order #10765 as of October 10.

Mannon added to the employee warning report: "Covered with employee—Did not ask him to sign."

[23] Discrepancies exist in the records.

[24] In March 1994, Cottrell had been assigned the job of rebuilding a different model shuttle but never finished that job, he testified, because he was probably called away to take care of a road job since he was, at that time, a road mechanic.

Bailey signed the document both as supervisor and preparer of the document. Mannon signed and dated it as approved.

I find from the above facts that Respondent began building its case against Cottrell in August 1994 when management first became aware of his prounion sympathies. Its campaign culminated in its termination of Cottrell for discriminatory reasons on October 10, 1995.

M. *The Mannon-Jackson Incident*

In July or August 1994, after Cottrell's mother died, he began to have problems with his retarded son. Sometimes he would have to leave work during the day to go home to take care of situations which would arise. Worrying about his son also proved a distraction on the job. Sheppard was aware of Cottrell's problems with his son, discussed it with him and on August 19 gave him the written warning to make better use of his time on the job. Cottrell told Sheppard that he was working on solving the problem. On December 27, 1994, Cottrell succeeded in getting his son admitted into the Potomac Center, an institution for the care of the retarded, located in Romney, West Virginia. In June 1995, he was able to have him transferred to Green Acres, a similar institution much closer to his home.

While Cottrell's son was at Green Acres, Cottrell would visit him every Friday evening. As a result of his visits, Cottrell became acquainted with Jim Jackson, an employee of the institution charged during the evening shift with taking care of his son and others living there.

On October 21, Jim Jackson was visiting the A-1 Car Center located close to his home. He was interested in cars and had worked as a master mechanic and electrician for 13 years with various companies in West Virginia. It was about closing time, when Ray Mannon came out of the A-1 car office and locked the door behind him. Mannon and Jackson then engaged in a general conversation about cars. Mannon introduced himself and mentioned his connection with the car lot and with State Equipment. Jackson had heard of State Equipment. He told Mannon about his own automotive experience and asked if he knew where he could find a job as a mechanic. Mannon replied that he was looking for a mechanic. Jackson then brought up Cottrell's name, not knowing he had been fired and thinking that he might use him as a reference. Mannon stated that he knew Cottrell, that he was a mechanic whom he had just let go and that was why he was looking for a mechanic.

As the two continued the discussion, Mannon invited Jackson to come by and see him at his office at State Equipment. At that point, Jackson asked specifically why Cottrell was no longer working at State Equipment. At first, Mannon explained that Cottrell was not getting his work done, that he was too slow. Jackson replied that he was 46 years old, that he was getting older and slower too. He added that Mannon was an older fellow himself, implying that he should have had more understanding. He said he thought that Cottrell had been with State Equipment a long time and asked a second time why Mannon had let him go. Mannon looked directly at Jackson, and said, "He was trying to get a union in there and I got rid of his ass."[25] The conversation abruptly ended at that point, it just stopped. Mannon said, "I got to go." He got into his car and left.

On October 31 Cottrell was at Green Acres, attending a Halloween party for the clients,[26] when Jim Jackson took him aside to talk to him. He told Cottrell that he had heard from Cottrell's boss that he had been fired and then went on to described his conversation with Mannon.

I find Mannon's admission to Jackson that he fired Cottrell because he was trying to get a union in conclusive. With the discharge of Cottrell, Respondent completed its campaign of riding itself of all overtly prounion employees.

N. *The Challenges*

In the Regional Director's Report on Challenged Ballots which issued on January 6, 1995, the Regional Director made the following determinations:

> The Administrative Law Judge designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a decision containing resolution of credibility of witnesses, findings of fact and recommendations as to the disposition of the issues raised by the challenges to the ballots of *Harold Kirk, David Westfall, Raymond Smith, Ty Landes, Virgil Elliott, John Cremeans and Johnny Bailey.*

Consequently, in accordance with the Regional Director's determination, based on the findings of fact, here, I make the following recommendations with regard to eligibility:

Harold Kirk: The ballot of *Harold Kirk* was challenged by the Board agent conducting the election because his name did not appear on the list of eligible voters. The Petitioner contends that Kirk is on workmen's compensation and is eligible to vote. The employer maintains that Kirk quit his employment by not returning to work after being released by his doctor and that he was terminated prior to the election date. Since no unfair labor practice charge has been filed with respect to Kirk's termination, the sole issue is whether his employment was affirmatively severed prior to the election.

Management witnesses testified that Kirk had been employed by Respondent sometime prior to mid-July 1993. He broke his wrist and went on workmen's compensation. Subsequently, Respondent received a letter from that agency, dated July 14, 1993, stating that he was released to come back to work but he never came back and Respondent never heard from him again.

On October 12, 1994, Mannon wrote a letter to Kirk confirming that his employment with Respondent was terminated in its records as of July 11, 1993. The October 12 letter, according to Terry Lamm, was based on the workman's compensation release of Kirk to return to work over a year before and his failure to either report for work or to communicate with Respondent.

Marie Eiler, who as office manager, is in charge of payroll and personnel files, testified that Kirk had been taken off the payroll in accordance with the company practice of removing from the payroll, any employee who fails to report back to work, when scheduled to do so, following prolonged ab-

[25] Mannon specifically denied making this statement. His denial is not credited. Similarly, where there are other differences in the testimony of Jackson and Mannon concerning this conversation, Jackson is credited.

[26] The term used for Cottrell's son and other individuals living at the establishment.

sence. He was not employed by Respondent as of the eligibility date of September 30, 1994.

Through it is not Respondent's practice to send letters to employees who are removed from the payroll for this reason, the October 12 letter was sent in Kirk's case because Lamm asked Eiler to send it. The same day that Eiler sent the confirming letter to Kirk, she sent a similar letter to a second employee who, like Kirk, was not on the payroll at the time. The certified letter to Kirk was received and the receipt signed by him on October 17. He did not contact Respondent at that time or ever concerning employment. He did, however, cast a ballot at the election which was challenged. Though present right in the building at the time of the election, Kirk made no effort to clarify his situation vis-a-vis employment with Respondent.

Counsel for Respondent represented at the hearing that the October 12 letters were sent out for the purpose of accurately preparing a voter's list and that but for the forthcoming election no letters would have been sent out. I accept these representations as credible.

Based on these facts, I find that Kirk was not an employee of the Respondent as of the eligibility date, the date of the election or at anytime for a least a year preceding the eligibility date. He is therefore ineligible to vote and his ballot should not be counted.

David Westfall, Raymond Smith, and *Ty Landes*: The ballots of David Westfall, Raymond Smith, and Ty Lanes were challenged by the board agent conducting the election because their names did not appear on the list of eligible voters. Inasmuch as I have found that Westfall, Smith, and Landes were terminated because of their union activities and sympathies in violation of Section 8(a)(1) and (3) of the Act, I also find that they are eligible to vote. Accordingly, I shall recommend that the challenges to their ballots be overruled.

Virgil Elliott and *John Cremeans*: The Petitioner challenged the ballots of Virgil Elliott and John Cremeans on the ground that they were not employed prior to the September 30, 1994 eligibility date. The Employer contends that they were employed and working prior to September 30, 1994.

Elliott and Cremeans have been described variously throughout the record as shop employees, handymen, maintenance employees, and carpenters. They are not mechanics but are clearly within the production and maintenance unit described in the Stipulated Election Agreement.

In order to determine whether or not Elliott and Cremeans were actually employed as of September 30, 1994, the General Counsel subpoenaed personnel and payroll records. Respondent produced the subpoenaed documents at the hearing and furnished a number witnesses to explain them. The documentary and testimonial evidence, taken together, indicate that Elliott and Cremeans both applied for work at Respondent's Cross Lanes facility and were interviewed for employment there on September 23. They both were placed on the payroll and began actual work on September 28 or 29, as regular part-time employees. They worked regularly thereafter for Respondent, Cremeans right to the day of the hearing, Elliott up until 2 or 3 months before the hearing.

From these facts, I conclude that both Cremeans and Elliott were employed as of the eligibility date and that the challenge to their ballots should be overruled.

Johnny Bailey: Respondent has admitted that Johnny Bailey is a supervisor within the meaning of the Act. The record is clear that this is true. He is therefore not eligible to vote.

O. *Summary*

1. Challenges

Having found that David Westfall, Raymond Smith, Ty Landes, Virgil Elliott, and John Cremeans are eligible to vote, inasmuch as their votes are sufficient in number to affect the results of the election, I have recommended that their ballots be counted.

2. The unfair labor practices

Having found that a number of allegations contained in the complaint are meritorious. I shall make recommendations, infra, in accordance therewith.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operation described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their knowledge of union organizing activities and sympathies; threatening an employee with reduced advancement opportunity because of his support for the Union; threatening an employee with the loss of his job if the employees selected the Union as their collective-bargaining representative; telling an employee that it could not give raises if the employees selected the Union as their collective-bargaining representative; and asking an employee to ascertain and disclose to Respondent the union membership, activities, and sympathies of other employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging or laying off David W. Westfall, Ty E. Landes, Everett Raymond Smith, Joseph T. Cottrell, and Carl Brock and by issuing written warnings to employees Carl Brock and Joseph T. Cottrell because they and other employees of Respondent formed, joined, or assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By issuing a written warning to and subsequently laying off Carl Brock because he gave testimony under the Act, Respondent violated Section 8(a)(1) and (4) of the Act.

6. The challenges to the ballots of David Westfall, Raymond Smith, Ty Landes, Virgil Elliott, and John Cremeans are invalid and must be overruled.

7. The challenges to the ballots of Harold Kirk and Johnny Bailey are valid and must be sustained.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. In particular, as I have found that certain employees were discriminatorily terminated, I shall recommend that Respondent be required to offer them full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]